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Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

CRAIG OUTDOOR ADVERTISING, INC., CURTIS MASSOOD, MIDWEST OUTDOOR MEDIA, LLC, AND PATRIOT OUTDOOR, LLC, PETITIONERS

v.

VIACOM OUTDOOR INC., WALLY KELLY AND HAROLD GUSTIN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the unchallenged "common purpose" of a RICO association-in-fact enterprise defeated as a matter of law where members of the enterprise have some divergent goals—an exceptionally important question in the administration of federal justice, both civil and criminal, that has created a split in the courts of appeals?

2. Does the Court of Appeals' hostility to "converting ordinary civil disputes into RICO cases" permit it to substitute its *post hoc* fact-finding for a jury verdict based on substantial evidence in order to circumvent this Court's repeated refusals to narrow the RICO statute?

3. Should the equitable standing rule be adopted in RICO and diversity fraud cases where the wrongdoer will otherwise escape liability for its fraudulent conduct by virtue of the fraudulent conduct itself?

RULE 29.6

Pursuant to Supreme Court Rule 29.6, Petitioners Craig Outdoor Advertising, Inc., Midwest Outdoor Media, LLC, and Patriot Outdoor, LLC hereby notify the Court that they do not have parent companies. Each are closely-held private companies that do not issue shares of stock to the public.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

RULE 29.6 ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT PROVISIONS INVOLVED 2

STATEMENT 2

REASONS FOR GRANTING THE PETITION 5

CONCLUSION 33

APPENDIX

Circuit Court Opinion (05-1953) 1a
District Court Order (5/25/2005) 51a
District Court Order (7/21/2004) 62a
District Court Final Judgment 67a
Order Denying Rehearing 70a
Viacom Letter to Tucker Outdoor (1/13/2003) ..... 72 a

TABLE OF AUTHORITIES

Page

CASES

B.T.Z., Inc. v. Grove, 803 F. Supp. 1019 (M.D. Pa. 1992) 27
Baker v. IBP, Inc., 357 F.3d 685 (7th Cir. 2004) ... 11, 12, 14, 18
Behalf of Viacom, Inc. v. Gollust, 909 F.2d 724, 726 (2d Cir. 1990), aff'd, 501 U.S. 115 (1991) 29
Blasband v. Rales, 971 F.2d 1034, 1044 (3d Cir. 1992) 30
Bridge v. Phoenix Bond & Indem. Co., 128 S. Ct. 2131, 2145 (2008) ..... *passim*
Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc., 271 F.3d 374 (2d Cir. 2001) 11
Galloway v. United States, 319 U.S. 372, 395 (1943) 20
H.J. Inc. v. Nw. Bell Tel. Co., 492 U.S. 229, 244 (1989) 9, 10, 15, 16
Heart of Am. Grain Inspection Serv., Inc. v. Mo. Dep't of Agric., 123 F.3d 1098, 1102 (8th Cir. 1997) 32
Keyser v. Commonwealth Nat'l Fin. Corp., 120 F.R.D. 489, 493 (M.D. Pa. 1988) 27
Maiz v. Virani, 253 F.3d 641, 654-57 (11th Cir. 2001) 30, 31
Mendoza v. Zirkle Fruit Co., 301 F.3d 1163 (9th Cir. 2002) 11
Miller v. Steinbach, 268 F. Supp. 255, 267 (S.D.N.Y. 1967) 27
Nat'l Org. for Women, Inc. v. Scheidler, 510 U.S. 249, 252 (1994) 9
Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 497 (1985) ..... *passim*
Terry A. Lambert Plumbing, Inc. v. W. Sec. Bank, 934 F.2d 976, 981 (8th Cir. 1991) 15
Trollinger v. Tyson Foods, Inc., 370 F.3d 602 (6th Cir. 2004) 11
United States v. Boyle, No. 05 4239-cr, 2007 WL 4102738 (2d Cir. Nov. 19, 2007) 6
United States v. Orena, 32 F.3d 704 (2d Cir. 1994) 13, 14
United States v. Shifman, 124 F.3d 31, 35 n.1 (1st Cir.

1997) 6
United States v. Turkette, 452 U.S. 576, 580 (1981) ..... *passim*
Williams v. Mohawk Indus., Inc., 411 F.3d 1252 (11th Cir. 2005) 11
Williams v. Mohawk Indus., Inc., 465 F.3d 1277 (11th Cir. 2006) 7, 11, 12, 18
Wilson v. Askew, 709 F. Supp. 146, 153 (W.D. Ark. 1989) 32

STATUTES

18 U.S.C. § 1961 2
18 U.S.C. § 1961(4) 2, 8
18 U.S.C. § 1962 26
18 U.S.C. § 1962(a) 4
18 U.S.C. § 1962(b) 31
18 U.S.C. § 1962(c) 7, 8
18 U.S.C. §§ 1961-68 2
28 U.S.C. § 1254(1) 1
28 U.S.C. § 1331 2
28 U.S.C. § 1332 2
84 Stat. 947 8
Pa. Const. Stat. § 1717 (1990) 27
Pub. L. 91-452 8

RULES

Fed. R. Civ. P. 50(a)(1) 20

PETITION FOR A WRIT OF CERTIORARI

Petitioners Craig Outdoor Advertising, Inc., Curtis Massood, Midwest Outdoor Media, LLC, and Patriot Outdoor, LLC respectfully pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Eighth Circuit reversing the jury's verdict and judgment on the RICO counts against Respondents Wally Kelly and Harold Gustin, and affirming the District Court's dismissal of the RICO claim against Viacom and finding of no standing as to Petitioner Curtis Massood.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-50a) is reported at 528 F.3d 1001 (8th Cir. 2008). The opinion of the District Court granting in part and denying in part Respondents' motion for summary judgment (App., *infra*, 51a-61a) is unreported. The opinion of the District Court granting in part and denying in part Respondents' motion to dismiss plaintiffs' First Amended Complaint (App., *infra*, 62a-66a) is unreported. The judgment of the District Court (App., *infra*, 67a-68a) is unreported.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered its judgment on June 4, 2008. The Court of Appeal denied a timely petition for rehearing en banc on July 10, 2008 (App., *infra*, 69a-71a). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

This petition concerns the interpretation of two provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), codified at 18 U.S.C. §§ 1961-68. The first, § 1962(c), states in pertinent part:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity . . . .

The second provision at issue, 18 U.S.C. § 1961(4), defines an "enterprise" to include "any individual, partnership, corporation, association, or other legal entity" and, as relevant here, "any union or group of individuals associated in fact although not a legal entity."

STATEMENT

The United States District Court for the Western District of Missouri had jurisdiction over this action pursuant to 28 U.S.C. § 1331 as the claims brought under the Racketeer Influenced Corrupt Organizations Act, 18 U.S.C. § 1961 *et seq.* raise a federal question. In addition, the District Court had diversity jurisdiction pursuant to 28 U.S.C. § 1332, as this action also brings state law claims by citizens of Missouri against citizens of other states, and the amount in controversy exceeds $75,000.

Plaintiffs Curtis Massood ("Massood"), Craig Outdoor Advertising, Inc. ("Craig") and Midwest Outdoor Media, LLC ("Midwest"), filed a Complaint against Viacom Outdoor, Inc. ("Viacom"), Wally Kelly ("Kelly"), Harold Gustin ("Gustin") and others on January 16, 2004.[1] This Complaint alleged violations of the federal Racketeering Influenced and Corrupt Organizations Act ("RICO") (hereinafter "RICO Claims"), as well as state law claims of fraud, tortious interference with a business expectancy, and unfair competition.

This action arose out of a scheme to defraud small billboard operators like plaintiffs out of their investment in, and right to leases for, various premium billboard advertising locations they had identified along railroad lines. New urban billboard locations are valuable because they are difficult to locate; are governed by overlapping federal, state, and municipal regulations; and provide substantial income from advertisers. 254:17-255:13; 407:15-409:4; 414:10-25; 621:17-622:14; 1743:20-1744:19.[2] Defendants' scheme involved inducing plaintiffs and other small billboard operators to reveal the locations of their premium sites to Viacom as agent for various railroads, through the representation that railroad billboard leases would be awarded on a "first-come, first-served" basis.

To accomplish this scheme, Viacom took advantage of its role as leasing agent for the railroads by denying or stalling plaintiffs' valid applications and

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[1] Patriot Outdoor, LLC ("Patriot") was added by amendment on November 1, 2004.

[2] The trial transcript is cited as "page number:line number."

taking the best sites for itself. In addition, defendants used this scheme to devalue the businesses owned by plaintiffs and other small billboard operators so that Viacom could purchase those companies at a reduced price.

On July 21, 2004, Judge Dean Whipple of the United States District Court for the Western District of Missouri partially granted defendants' Motion to Dismiss the First Amended Complaint. The Court found that plaintiff Massood lacked standing to bring his claims and dismissed all counts alleged by Massood. On May 25, 2005, the Court partially granted defendants' Motion for Summary Judgment. The Court found that—as to all RICO Claims against Viacom—the "enterprise" requirement was not met. The Court also granted summary judgment for defendants Gustin and Kelly on plaintiffs' RICO claim under 18 U.S.C. § 1962(a) as well as on plaintiffs' request for injunctive relief.

This case proceeded to trial in July 2005. On July 26, 2005, the jury found in favor of plaintiffs Craig, Patriot, and Midwest and against Viacom on the state law claims, and in favor of plaintiffs and against Gustin and Kelly on the remaining RICO claim. After post-trial motions by both sides, final judgment was rendered on July 18, 2006, awarding actual and punitive damages to Craig in the amount of $2,144,445; to Midwest in the amount of $2,144,445; and to Patriot in the amount of $850,000. In addition, the Court granted plaintiffs a RICO fee award from defendants Kelly and Gustin in the amount of $1,863,840.

On appeal, the Eighth Circuit affirmed the jury verdict and judgment for fraud, tortious interference, and unfair competition against Viacom, ruling *inter alia* that Viacom's failure to tell applicants that it would take the good sites for itself constituted fraud by omission. *Craig Outdoor Adver., Inc. v. Viacom Outdoor, Inc.*, 528 F.3d 1001, 1013 (8th Cir. 2008). But the panel ruled that plaintiffs failed to prove the fraud was "continuing" under RICO because more than a year after the first acts of fraud, defendant Gustin caused Viacom to start sending new applicants letters telling them that Viacom would "review" their applications. *Id.* at 1028-29. The panel did not address how Viacom's failure to admit in its letter that it would take the good sites for itself could cure the fraud the Court of Appeals found Viacom was committing.

The panel also affirmed the District Court's dismissal of the RICO claim against Viacom, but on different grounds. The panel held that evidence of "divergent goals" among some members of an alleged association-in-fact enterprise defeats the "common purpose" requirement of RICO. *Id.* at 1027. The panel also affirmed the dismissal of Massood's claims on standing grounds, rejecting his argument on equitable standing. *Id.* at 1025. The Court of Appeals denied a timely petition for rehearing en banc. App., *infra*, 69a-71a.

REASONS FOR GRANTING THE PETITION

Question One - Is the unchallenged "common purpose" of a RICO association-in-fact enterprise defeated as a matter of law where members of the enterprise have some divergent goals—an

exceptionally important question in the administration of federal justice, both civil and criminal, that has created a split in the courts of appeals?

I. The Court Should Hear this Case to Resolve an Important Question of Statutory Construction that has Split the Circuits: Must Proof of a "Common Purpose" in a RICO Association-in-Fact Enterprise Exclude All "Divergent Goals" among the Members?

The Eighth Circuit's decision that a "common purpose" cannot exist amongst members of a RICO association-in-fact enterprise where the members have "divergent goals"—i.e., purposes *not* in common—will cripple both criminal prosecutions and civil actions.[3] *See Craig Outdoor Adver., Inc. v. Viacom Outdoor, Inc.*, 528 F.3d 1001, 1027 (8th Cir. 2008). In the criminal arena, the Eighth Circuit's ruling essentially gives the RICO defendant a "Get Out of Jail Free" card. If the decision stands, a defendant need only show that one of the members of the alleged enterprise has a purpose that is not in common with another member of the enterprise to win dismissal or acquittal *for all*.[4]

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[3] The requirements of 18 U.S.C. § 1962(c) "apply whether the RICO claim is civil or criminal in nature." *Williams v. Mohawk Indus., Inc.*, 465 F.3d 1277, 1282 (11th Cir. 2006); *United States v. Shifman*, 124 F.3d 31, 35 n.1 (1st Cir. 1997) (stating that "the standard is the same for both criminal and civil RICO violations").

[4] This Court recognized the need for increasing clarity of the rules governing association-in-fact enterprises when it granted certiorari in *United States v. Boyle*, No. 05-4239-cr, 2007 WL 4102738 (2d Cir. Nov. 19, 2007) on October 1, 2008.

Similarly, in civil claims, any time a defendant can show that one of the members of the association-in-fact enterprise has a purpose at odds with another—which will necessarily be the case where the enterprise counts both legal and illegal entities amongst its members—the entire claim will fail. This approach defeats the broad remedial purposes of RICO.

The panel's decision in *Craig* adds a new requirement to the enterprise element of RICO: members of an association-in-fact enterprise cannot have "divergent goals." This decision ignores this Court's repeated "refus[als] to adopt narrowing constructions of RICO," *Bridge v. Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131, 2145 (2008)[5]; is in direct conflict with a decision from the Eleventh Circuit Court of Appeals, *see Williams v. Mohawk Indus., Inc.*, 465 F.3d 1277 (11th Cir. 2006); and has no support in the RICO statute. *See* 18 U.S.C. § 1962(c). Indeed, as this Court observed four months ago in *Bridge*, the "proposed requirement...seems to come out of nowhere." 128 S. Ct. at 2138 (observing that "if petitioners' proposed requirement . . . seems to come out of nowhere, there is a reason: Nothing on the face of the relevant statutory provisions imposes such a requirement.") Furthermore, this ruling will cripple criminal RICO prosecutions involving association-in-fact enterprises and severely hinder civil RICO claims. This definition of "common purpose" was never intended by Congress, and this Court should repudiate it.

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[5] The Court of Appeals decision in this case was handed down less than a week before this Court's opinion in *Bridge*.

A. The Court of Appeals' Ruling Is In Direct Conflict With This Court's Instructions Refusing to Narrow the RICO Statute

RICO makes it "unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). RICO "is to be read broadly." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 (1985). This results from Congress' "express admonition that RICO is to 'be liberally construed to effectuate its remedial purposes,'" and "the statute's 'remedial purposes' are nowhere more evident than in the provision of a private action for those injured by racketeering activity." *Id.* at 497-98 (quoting Pub. L. 91-452, § 904(a), 84 Stat. 947).

A private party who has been injured in his property may sue for damages if he can show "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima*, 473 U.S. at 496. An enterprise is "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4).

There is "no restriction upon the associations embraced by the definition: an enterprise includes any union or group of individuals associated in fact." *United States v. Turkette*, 452 U.S. 576, 580 (1981). An association-in-fact enterprise is "an entity, for present purposes a group of persons associated together for *a common purpose* of engaging in a course of conduct,"

that is "proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *Id.* at 583 (emphasis added).

Notwithstanding the plain language of *Turkette*, the Court of Appeals held that a common purpose among enterprise members is not sufficient—indeed, it ceases to exist—where there is evidence of "divergent goals." *Craig*, 528 F.3d at 1027 (holding that "divergent goals among members of a purported association-in-fact enterprise is a fatal problem to a RICO claim"). In other words, pursuant to the Eighth Circuit's new requirement, if there are non-common purposes among the RICO enterprise members, then the stated and otherwise uncontroverted common purpose is eviscerated. This narrowing of RICO's enterprise element is unsupportable. Indeed, the Eighth Circuit's decision in *Craig* directly conflicts with precedent of this Court. *See, e.g.*, *Bridge*, 128 S. Ct. at 2145 (refusing to adopt "narrowing constructions of RICO") (citing *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 252 (1994) (rejecting the argument that "RICO requires proof that either the racketeering enterprise or the predicate acts of racketeering enterprise or the predicate acts of racketeering were motivated by an economic purpose"); *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 244 (1989) (rejecting "the argument for reading an organized crime limitation into RICO's pattern concept"); *Sedima*, 473 U.S. at 481 (rejecting the view that RICO provides a private right of action "only against defendants who had been convicted on criminal charges, and only where there had occurred a 'racketeering injury'")).

Here, the Eighth Circuit's "narrow construction" of RICO's common purpose requirement is without question "counterproductive and a mismeasure of congressional intent." *H.J., Inc.*, 492 U.S. at 248-49. As a result of this erroneous decision, it is no longer enough to comply with this Court's mandate that an association-in-fact have a "common purpose." *Turkette*, 452 U.S. at 583. Henceforth in the Eighth Circuit, a RICO claim involving an association-in-fact enterprise will survive a motion to dismiss only if the members of the enterprise have (1) a common purpose *and* (2) no purposes that are *not* in common. But as this Court has noted time and again, it is not the province of the courts to "rewrite RICO." *Bridge*, 128 S. Ct. at 2145.

The Eighth Circuit should not be allowed to "adopt narrowing constructions of RICO in order to make it conform to a preconceived notion of what Congress intended to proscribe." *Id.* Petitioners respectfully request this Court to grant certiorari and reverse the Eighth Circuit's holding. *See H.J. Inc.*, 492 U.S. at 236.[6]

B. The Eighth Circuit Decided an Important Element of RICO Law In A Manner That Directly Conflicts With The Recent Ruling of the Eleventh Circuit

The Eighth Circuit's opinion in *Craig*, 538 F.3d 1001, directly conflicts with the Eleventh Circuit's holding in *Williams v. Mohawk Indus., Inc.*, 465 F.3d

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[6] Alternatively, this Court could vacate the Eighth Circuit's decision and remand for reconsideration in light of *Bridge*.

1277 (11th Cir. 2006). In fact, the only case upon which the Eighth Circuit relied—*Baker v. IBP, Inc.*, 357 F.3d 685 (7th Cir. 2004)—was expressly rejected by the *Williams* court. 465 F.3d 1277.

In *Williams*, hourly employees brought a class action alleging that defendant Mohawk Industries knowingly employed and harbored illegal workers, allowing it to reduce labor costs in violation of RICO. 465 F.3d at 1277.[7] The enterprise consisted of "Mohawk and third-party temp agencies/recruiters," and "the recruiters and Mohawk share[d] the common purpose of obtaining illegal workers for employment by Mohawk." *Id.* at 1284 (quotations omitted). The Eleventh Circuit found the plaintiffs had "properly alleged a common purpose for the purposes of RICO." *Id.* at 1285.

In holding the RICO claim sufficiently pled, the Eleventh Circuit recognized that its holding was consistent with recent decisions in the Second, Sixth, and Ninth Circuits,[8] but it was "in conflict with the

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[7] The United States District Court for the Northern District of Georgia denied defendant's motion to dismiss RICO claims and the Court of Appeals affirmed. *Williams v. Mohawk Indus., Inc.*, 411 F.3d 1252 (11th Cir. 2005). This Court initially granted certiorari, but dismissed the writ and remanded after oral argument. *Id.* This opinion is the Eleventh Circuit's decision on remand.

[8] *See Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602 (6th Cir. 2004) (former employees alleging employer used illegal immigrants in order to depress wages); *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163 (9th Cir. 2002) (legally documented workers alleging that employers leveraged hiring of undocumented workers in order to depress wages); *Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc.*, 271 F.3d 374 (2d Cir. 2001) (company alleging competitor hired undocumented workers in order to underbid competing firms).

Seventh Circuit's decision in *Baker v. IBP, Inc.*, 357 F.3d 685 (7th Cir. 2004)." *Id.*

In *Baker*, an employees' class-action lawsuit alleged that a meat processing facility conspired with recruiters and violated RICO by employing illegal workers in an effort to drive down employee wages. 357 F.3d at 687. The Seventh Circuit determined that the members of the enterprise—defendant plus "the persons and organizations who help it find aliens to hire"—did not share a common purpose because the members had "divergent goals: IBP want[ed] to pay lower wages; the recruiters want[ed] to be paid more for services rendered (though IBP [wanted] to pay them less); [and] the Chinese Mutual Aid Association want[ed] to assist members of its ethnic group." *Id.* at 691.

The Eleventh Circuit specifically addressed *Baker*, stating that in its circuit, "there has never been any requirement that the 'common purpose' of the enterprise be the **sole purpose of each and every member of the enterprise.**" *Williams*, 465 F.3d at 1285-86 (emphasis added). The Court then noted that "all that is required is that the enterprise have **a** common purpose." *Id.* at 1286 (emphasis in original).

The Eighth Circuit's ruling cannot be reconciled with the holding in *Williams*. Rather than requiring **a** common purpose, the Eighth Circuit requires no "divergent goals," or no purposes *not* in common. Because this new requirement directly conflicts with the holding of another Court of Appeals petitioners respectfully request this Court reverse the Eight Circuit's erroneous holding that "divergent goals" are a

"fatal problem to a RICO claim." *Craig*, 528 F.3d at 1027.

C. The Eighth Circuit's Requirement That Enterprise Members Have No Divergent Goals Will Cripple RICO Criminal Prosecutions

Henceforth in the Eighth Circuit, a defendant only need show that the members of the alleged enterprise have "divergent goals" to escape RICO's reach. Irrespective of whether the association-in-fact has a common purpose, if the members have purposes that are not in common, the RICO claim fails.

The risk to prosecutions is illustrated by the facts in *United States v. Orena*, 32 F.3d 704 (2d Cir. 1994). Victor Orena was convicted of racketeering and murder. *Id.* at 708-09. The alleged association-in-fact enterprise consisted of "five New York families"; the defendant was the acting "head boss" of the entire organization. *Id.*

On appeal from his conviction, Orena argued that the enterprise was legally insufficient as a result of "conflict" between the members of the enterprise. *Orena*, 32 F.3d at 710. Orena contended that because the enterprise members were at war with each other, they could not have constituted a RICO association-in-fact enterprise. *Id.* at 709. The Second Circuit disagreed, holding that "the existence of an internal dispute does not signal the end of an enterprise." *Id.*

If the Eighth Circuit's ruling were to stand, cases like *Orena* would result in dismissals or

acquittals. It will often occur that an association-in-fact enterprise comprised of different criminal actors will have within it members with non-common purposes. In *Orena*, for example, it is indisputable that members of the enterprise had some "divergent goals." 32 F.3d at 708. Indeed, Orena, the head boss of the collective enterprise, was convicted of murdering the "boss" of one of the other enterprise families.[9] *Id.* Goals cannot be more divergent. *Id.* If the Eighth Circuit's definition of a common purpose had been applied to *Orena*, Orena would have almost certainly been acquitted, or the charges against him dismissed.

Indeed, *Baker's* holding is untenable for this very reason. The *Baker* Court held that because the recruiters want to be paid more and the employers want to pay them less, there is no common purpose amongst the members of the enterprise, and, thus, no RICO claim. 357 F.3d at 691. But this makes no sense. In traditional RICO drug distribution enterprises, for example, dealers want to be paid more and suppliers want to pay them less. Does that mean that RICO claims against drug operations cannot proceed?

Simply put, if the Eighth Circuit's definition of "common purpose" stands, prosecution of the very conduct for which RICO unquestionably was enacted will be threatened. *See Turkette*, 452 U.S. at 589 (quoting the Organized Crime Control Act of 1970, 84 Stat. 922). Indeed, "[w]hole areas of organized criminal

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[9] Victor Orena was the head boss of the "Colombo Organized Crime Family of La Cosa Nostra." *Orena*, 32 F.3d at 708. Thomas Ocera, the murder victim, was the "family captain" of the Colombo Family – one of the families included in "La Cosa Nostra." *Id.*

activity [will] be placed beyond the substantive reach" of the RICO statute. *Id.*

This Court has noted that Congress enacted RICO as "an aggressive initiative to supplement old remedies and develop new methods for fighting crime." *Sedima*, 473 U.S. at 498. The Eighth Circuit's new requirement will do the opposite—indeed, it will make it harder to prosecute and convict criminals. Certainly this is not what Congress intended.

D. It Is Not the Eighth Circuit's Job To Edit the RICO Statute; If "Narrowing" Is Desirable, It Is Up To Congress

In *Craig*, the Eighth Circuit concedes its hostility toward civil RICO claims, stating that "we have in the past rejected attempts to convert ordinary civil disputes into RICO cases." 528 F.3d at 1029; *see also Terry A. Lambert Plumbing, Inc. v. W. Sec. Bank*, 934 F.2d 976, 981 (8th Cir. 1991) (noting that RICO was not intended to apply to "ordinary commercial fraud"). But the Eighth Circuit's agenda is misplaced. It is not the province of the courts to decide that a statute's reach is too broad and thereafter act to narrow it. *See H.J., Inc.*, 492 U.S. at 240 ("[R]ewriting [RICO] is a job for Congress, if it is so inclined, and not for this Court.") While it may well be frustrating to the Eighth Circuit that RICO encompasses what it views as "ordinary civil disputes," the panel was not "at liberty to rewrite RICO to reflect [its] views of good policy." *Bridge*, 128 S. Ct. at 2145. As this Court instructs, "[i]t is not for the judiciary to eliminate the private action in situations where Congress has provided it." *Id.* (quoting *Sedima*, 473 U.S. at 499-500).

While "[t]he occasion for Congress' action [in enacting RICO] was the perceived need to combat organized crime," Congress "for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime." *H.J. Inc.*, 492 U.S. at 249. Congress intended for RICO to reach corrupt business practices; "[t]he statute's remedial purposes are nowhere more evident than in the provisions of a private action for those injured by racketeering activity." *Sedima*, 473 U.S. at 498.

The Eighth Circuit has introduced a new RICO requirement that is found nowhere in the statute or case law in an effort to stem what the panel viewed as unduly proliferate civil RICO claims. This approach violates this Court's direction. *Bridge*, 128 S. Ct. at 2145.

E. The Eighth Circuit's Decision in *Craig* Was Plainly Wrong

In their Complaint, plaintiffs alleged three association-in-fact enterprises: Viacom and Burlington Northern Santa Fe Railroad; Viacom and Kansas City Southern Railroad; and Viacom and Boston & Maine Railroad. *Id.* at 1026. The common purpose of each of these enterprises was "leasing property owned by the railroads to outdoor billboard businesses." *Id.* at 1026. There is no dispute that Viacom had this purpose in common with each of the railroads. This truth notwithstanding, the Eighth Circuit held that no common purpose existed because the enterprise members had three purposes that were *not* in common. *Id.* at 1026-27. Specifically, the Court stated:

By Plaintiffs' own account, Viacom was operating strictly in its own best interests, appropriating billboard sites and delaying site applications when circumstances dictated that such action would benefit Viacom. Plaintiffs described several instances in which Viacom's conduct resulted in sites being "spaced out" by billboards erected on neighboring property, thus preventing the affected railroad from ever benefiting from a billboard located on its property. It is unlikely that the railroads would cooperate with Viacom to achieve this goal. Plaintiffs also described how Viacom hoped to discourage site applicants who intended to resell their billboards or licenses for what Viacom believed were undeserved profits. We cannot conceive how this goal was shared by any of the railroads, which presumably did not care who held the license for a particular billboard site as long as fees were paid. Plaintiffs also alleged that Viacom operated these RICO enterprises with a goal of eliminating competition in its billboard markets. Again, this goal would appear to be Viacom's alone, since competition for billboard sites on railroad property would presumably be in the railroads' best interests. In short, the Plaintiffs failed to allege sufficient facts to demonstrate Viacom and each of the three railroads had "a common purpose of engaging in a course of conduct." And "divergent goals" among members of a purported association-in-fact enterprise is a "fatal problem" to a RICO claim.

Id. (quoting *Turkette*, 452 U.S. at 583; *Baker*, 357 F.3d at 691).

While plaintiffs readily agree that the railroads did not share in Viacom's desire to space out competitors' billboard sites, discourage site applicants who intended to resell their billboards, and eliminate competition in the billboard markets, it matters not—the Eighth Circuit's focus is, again, misplaced. RICO does not require plaintiffs to show that the railroads and Viacom shared every purpose—it requires only that plaintiffs show the railroads and Viacom shared **a common purpose**. *See Williams*, 465 F.3d at 1286 (stating that "all that is required [to successfully plead an association-in-fact enterprise] is that the enterprise have *a* common purpose.") This the plaintiffs did.

Accordingly, this Court should grant certiorari to reject the Eighth Circuit's requirement of no "divergent goals," reverse the finding of no RICO enterprise, and remand for trial on these counts.

Question Two - Does the Court of Appeals' hostility to "converting ordinary civil disputes into RICO cases" permit it to substitute its *post hoc* fact-finding for a jury verdict based on substantial evidence in order to circumvent this Court's repeated refusals to narrow the RICO statute?

II. The Court Should Hear this Case to Require the Eighth Circuit Court of Appeals to Follow This Court's Instructions Against Narrowing RICO By Reversing a Jury Verdict against Defendants Kelly and Gustin that was Supported by Substantial Evidence

The Eighth Circuit panel reversed a jury verdict based on its conclusion that a Viacom form letter "expressly terminated" the racketeering activity despite the testimony of Kelly and Gustin that Viacom had not changed the policies the jury found to be fraudulent. The jury considered that letter—allegedly distributed by Viacom to new site applicants beginning in January 2003—and rejected defendants' contention that dissemination of the letter terminated the fraud. Moreover, the Eighth Circuit's conclusion clearly contradicts its own analysis of plaintiff's state-law fraud claims, where it found fraud by omission in Viacom's failure to warn applicants it planned to take all the good sites for itself.

The Eighth Circuit's substitution of its fact-finding for that of the jury's verdict can be explained only by the panel's distaste for applying RICO to "ordinary civil disputes" and its rebellion against this Court's often repeated instruction that RICO cannot be narrowed based on judicial hostility. *Craig*, 528 F.3d at 1029; *see Bridge*, 128 S. Ct. at 2145. This Court should grant certiorari to correct the Eighth Circuit's open defiance of controlling authority and to protect the broad scope of RICO from Trojan-horse attempts to narrow its scope through appellate fact-finding.

A. The Eighth Circuit's Analysis of the Evidence Is Untenable and Contradictory

Judgment as a matter of law following a jury verdict is appropriate *only* when "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue." Fed. R. Civ. P. 50(a)(1); *see Galloway v. United States*, 319 U.S. 372, 395 (1943) (judgment as matter of law required only when a verdict could only have been based on "mere speculation"). While the Eighth Circuit acknowledged that a jury's verdict is entitled to "extreme deference," it gave no deference whatsoever to the jury's RICO verdict in this case. *Craig*, 528 F.3d at 1009.

The Eighth Circuit characterized the racketeering activity as "using the mails and wires to conceal or misrepresent the review process; not the review process itself." *Craig*, 528 F.3d at 1028. It concluded that Viacom misrepresented the review process by concealing the fact that defendants would *steal* good sites:

> [O]nly Viacom was in a position to know that its application-processing procedures included an internal review by a local Viacom office and a determination by that office of whether a particular site should be appropriated by Viacom or released to an applicant.

Id. at 1010.

To succeed on their RICO claim, plaintiffs were required to—and, according to the jury, did—prove

that there was a threat that defendants would continue to use the mails and wires to fail to "inform Plaintiffs that the sites identified in their applications could be appropriated by Viacom if the site was deemed desirable by the local office." *Craig*, 528 F.3d at 1010 (noting that the omission was fraudulent because Viacom possessed superior knowledge not reasonably available to plaintiffs).

In ruling that plaintiffs failed to show that Kelly and Gustin engaged in a pattern of racketeering activity, the panel held that the letter "effectively terminated any allegedly fraudulent scheme . . . by expressly notifying site applicants that Viacom would review all applications for billboard licenses and rule on each application in its *discretion*." *Craig*, 528 F.3d at 1028. But the jury considered and rejected defendants' contention that the letter ended the scheme. The Eighth Circuit's theory would only be plausible if the letter actually revealed that Viacom would take the good sites for itself, thereby nullifying the fraud. But the letter quite obviously did nothing of the sort.

The critical part of the letter states:

> Please be informed that until such time as you receive written confirmation of the approval of your application and a license agreement is fully executed, *you are not authorized to survey the subject property, apply for any permits or take any other action which impacts the subject land, including but not limited to applying for zoning approval or variance, without the express and specific written consent of Viacom Outdoor,*

> *which may be given or denied at the sole discretion of Viacom Outdoor.*

App., *infra*, 72a-73a.

Notably, the letter does not identify who is reviewing the applications and does not tell applicants that Viacom will take the good sites for itself. Contrary to the Eighth Circuit's factual finding on Viacom's fraud, it does not notify the applicant that an application may be subject to "an internal review by a local Viacom office and a determination by that office of whether a particular site should be appropriated by Viacom or released to an applicant." *Craig*, 528 F.3d at 1010. That is the fraud the Eighth Circuit identified – and the letter does nothing to correct it.[10]

Even if the panel somehow could interpret the letter as nullifying the fraud, this is certainly not the only *reasonable* interpretation. The jury read this letter itself, considered all the other evidence not even mentioned by the Eighth Circuit, and determined that Kelly and Gustin engaged in a pattern of racketeering activity.

Additionally, substantial evidence (ignored by the Eighth Circuit) demonstrates that the fraud continued. In analyzing plaintiffs' state law claims, the Eighth Circuit itself found evidence that applicants continued to be defrauded by the review process after January 2003, when Viacom began distributing the

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[10]Importantly, even if the letter had "terminated" the fraud—which it did not—it did not "cure" the fraud as the letter was not sent to any of the plaintiffs. The letter went only to "new applicants" from "2003 forward."

letter. *Craig*, 528 F.3d at 1011 (discussing Viacom's rejection of two site applications due to the plaintiff's alleged "lack of activity" on the application in March 2003). In addition, Viacom's President Kelly asserted at trial in July 2005 that if a site application came in "tomorrow," Viacom could take the site if it wanted and that defendants had no obligation to tell applicants of Viacom's plan. The Eighth Circuit found that failing to disclose that plan was fraud, yet found the fraud was not "continuing" despite Kelly's testimony. *See Craig*, 528 F.3d at 1001.

Further, whistleblower David Gilley testified he was being pressured to lie about the review process in March 2003—*after* Viacom claimed it started distributing to new applicants the letter, which the Panel claimed "terminated" the fraud. The Eighth Circuit did not discuss or acknowledge this evidence, but the jury could have reasonably inferred from this evidence that defendants continued to engage in a pattern of racketeering activity.

B. The Panel's Usurpation of the Jury's Fact-Finding Role Was Motivated by Its Desire to Narrow the Scope of RICO in Direct Conflict With This Court's Precedents

The panel substituted its *post hoc* interpretation of the letter for that of the jury, which considered the letter in the context of the whole trial and the testimony of the witnesses. This usurpation of the jury's role breeds contempt for the rule of law. Even if this letter were ambiguous, plaintiffs are entitled to "all favorable inferences that can reasonably be drawn from

the evidence." *Craig*, 528 F.3d at 1027 (citing *Brown v. Fred's, Inc.*, 494 F.3d 736, 740 (8th Cir. 2007)). The jury could reasonably have concluded that the letter failed to correct the fraud and that the fraud continued after the letter's issuance.

In *any* case, an appellate court's usurpation of the jury's fact-finding role would constitute clear and obvious error. The Eighth Circuit's untenable analysis of the evidence here demonstrates its apparent belief that, *in RICO cases*, it may disregard an otherwise rational jury verdict to further its mission of keeping plaintiffs from converting "ordinary civil disputes into RICO cases." *Craig*, 528 F.3d at 1029. This policy choice by the Eighth Circuit flaunts the text of RICO and has been expressly repudiated by this Court, most recently in *Bridge*. 128 S. Ct. at 2145 ("[W]e are not at liberty to rewrite RICO to reflect [petitioners']—or our—views of good policy.").

This Court has repeatedly rejected attempts by various courts of appeal to limit the scope of RICO based on judicial policy concerns. 128 S. Ct. at 2145 ("We have repeatedly refused to adopt narrowing constructions of RICO in order to make it conform to a preconceived notion of what Congress intended to proscribe."); *see also Sedima*, 473 U.S. at 499-500 ("It is not for the judiciary to eliminate the private action in situations where Congress has provided it . . . .")

In light of this Court's clear instruction that RICO must not be limited based on judicial policy concerns, the Eighth Circuit's narrowing of RICO by commandeering the jury's fact-finding role repudiates this Court's directions by narrowing RICO through

fact-finding, rather than through direct legal rulings on the scope of the statute. Should this Court permit lower courts to end run this Court's instructions by usurping the jury's fact-finding role, this Court's precedents in *Bridge*, *Sedima*, and other cases will quickly become dead letters. Given the importance of RICO as a broad tool to combat organized crime, this Court should grant certiorari to reinforce its insistence that lower courts may not restrict the scope of RICO based on policy concerns through appellate fact-finding or any other vehicle.

Question Three - Should the equitable standing rule be adopted in RICO and diversity fraud cases where the wrongdoer will otherwise escape liability for its fraudulent conduct by virtue of the fraudulent conduct itself?

III. The Court Should Hear this Case to Decide a Substantial Question of Federal Law on Which it has Not Ruled: Whether Equitable Standing Should Apply in RICO and Diversity Fraud Cases Where the Derivative Standing Allows a Wrongdoer to Escape Liability Entirely

A. The Equitable Standing Rule From Federal Securities Law Should Apply to RICO and Fraud Claims To Give Mr. Massood Standing Where the Wrongdoer Would Otherwise Benefit From Its Fraudulent Conduct

Plaintiff Curtis Massood brought RICO and state law claims against defendants to recover the "loss he suffered as a result of the lost value in the Wilson-

Curtis shares he owned."[11] *Craig*, 528 F.3d at 1024 (quotations omitted). In plaintiffs' First Amended Complaint, Massood alleged that Viacom fraudulently denied his billboard applications and obtained the locations for itself, in part, to lower the value of stock in Wilson-Curtis, Inc.—a company partially owned by Massood—so it could purchase Wilson-Curtis at a reduced rate and eliminate Massood as a competitor in the market.

The District Court ruled that, as a shareholder, Massood lacked standing to sue for injury to the Wilson-Curtis corporation under the derivative standing rule, and dismissed his claims. *Craig*, 528 F.3d at 1024-25. The Eighth Circuit affirmed the District Court's decision. *Id.* at 1025. Both courts erred.

While it is true that, pursuant to the "shareholder derivative rule" an individual only has standing to pursue a derivative suit on behalf of a corporation if he/she is presently a shareholder in the corporation, equity demands a different rule in the unusual situation—present here—where the fraudulent activity of the wrongdoer (Viacom) enabled it to buy the corporation (Wilson-Curtis) victimized by its wrongful conduct. In such circumstances, equitable standing avoids the unfair result of allowing Viacom to benefit from its fraudulent conduct by depriving Massood from seeking recourse through the corporation. *See, e.g., Miller v. Steinbach*, 268 F. Supp.

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[11]Massood brought RICO claims under 18 U.S.C. § 1962 (a), (b), (c), and (d), and state law claims of fraudulent misrepresentation, tortious interference with a business expectancy, and unfair competition.

255, 267 (S.D.N.Y. 1967) (holding that a former shareholder could sue for his derivative injuries—even though the corporation on behalf of which he sued had been merged into another corporation—where "the very merger itself took place because of the allegedly wrongful activities of the directors of the old corporation and the management of the surviving corporation"). As the court in Miller noted, "[t]o hold that the surviving corporation inherits a derivative right of action where said corporation has wrongfully taken part in the very acts complained of would be to reach an incongruous and highly inequitable result." *Id.*

Though it has never been applied to RICO actions, equitable standing is a well-recognized doctrine. *See* 5 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE § 23.1.08[1] (3d ed. 2000) (a "plaintiff shareholder implicates the surviving corporation in the alleged wrongdoing relating to the merger . . . the right to bring a derivative suit *does not pass* to the surviving corporation and the *former* shareholders" *retain standing* to bring suit to recover for their otherwise derivative injuries) (emphasis added); *Keyser v. Commonwealth Nat'l Fin. Corp.*, 120 F.R.D. 489, 493 (M.D. Pa. 1988), *superseded by statute on other grounds*, 15 Pa. Const. Stat. § 1717 (1990), *as recognized in B.T.Z., Inc. v. Grove*, 803 F. Supp. 1019 (M.D. Pa. 1992) (standing granted to plaintiffs where merger took place because of allegedly wrongful conduct of directors of old corporation and management of new corporation).

Massood was approached by Viacom during the summer of 1997 inquiring about the possible acquisition

of Wilson-Curtis. *Craig*, 528 F.3d at 1024. After identifying new billboard locations in December of 1997 and inquiring about leases for those locations in early 1998, Viacom fraudulently denied his applications and obtained the locations for itself. *Id.*

Mr. Massood alleges that this fraudulent conduct was committed—not only for the purpose of stealing the sites—but for the additional purposes of lowering the value of Wilson-Curtis so that Viacom could purchase it at a reduced value *and* eliminate Massood as a competitor. *Id.* This conduct improved the competitive position of Viacom because it obtained for "free" the new billboard sites Massood had proposed as well as the other billboard locations owned by Wilson-Curtis. *Id.* Massood was damaged as a result. *Id.*

Unlike plaintiffs in the derivative cases cited by the District Court (App., *infra*, 62a-66a) and the Eighth Circuit (App., *infra*, 34a-38a), Mr. Massood cannot rely upon Wilson-Curtis to pursue a derivative action because his former company is now owned 100% by Viacom. Indeed, if Massood is not permitted to pursue his claims, then Viacom will escape liability for the fraudulent conduct alleged by Massood in plaintiffs' First Amended Complaint by virtue of the fraudulent conduct itself.

B. The Second and Third Circuits Have Recognized That Equitable Standing Is Required in Securities Cases Where a Wrongdoer Would Otherwise Benefit From Its Fraudulent Conduct

In analyzing comparable standing issues related to claims brought pursuant to Section 16(b) of the Securities and Exchange Act of 1934, the Second Circuit held that shareholders could pursue an action to disgorge defendants of ill-gotten gains. *Mendell, in Behalf of Viacom, Inc. v. Gollust*, 909 F.2d 724, 726 (2d Cir. 1990), *aff'd*, 501 U.S. 115 (1991). Ironically, in that case, plaintiff was a former shareholder of Viacom International, Inc. ("International") which, during the course of the suit, was acquired through a merger transaction by a shell corporation—Viacom, Inc. *Id.* After the merger, "defendants asserted that plaintiff no longer had standing to maintain his § 16(b) suit since he was no longer a shareholder of International." *Id.*

In *Mendell*, the District Court for the Southern District of New York dismissed plaintiff's claims on the same standing rationale applied by the District Court here—and the Second Circuit reversed. 909 F.2d 724. It found that "a rule that allows insiders to avoid § 16(b) liability by divesting public shareholders of their cause of action through a business reorganization would undercut the function Congress planned to have shareholders play in policing such actions." *Id.* at 731.

The Second Circuit's rationale is entirely applicable to the situation here. Mr. Massood alleged that the purchase of Wilson-Curtis was part of a fraudulent scheme by Viacom to steal the sites

identified by Massood, to devalue Wilson-Curtis, and to undermine Massood's competitive position in the market. As the Third Circuit has recognized, where dismissal of a claim "may well leave a wrong unremedied," equitable standing is required. *Blasband v. Rales*, 971 F.2d 1034, 1044 (3d Cir. 1992) (holding that plaintiff has derivative standing related to his standing as shareholder of former company where after merger, successor company refuses to pursue the cause of action).

C. The Rationale For the Derivative Standing Rule Is Not Applicable to the Facts Of This Case

The purpose of the derivative standing rule is to avoid duplicative litigation. That purpose does not apply when—as part of the wrongdoer's fraudulent scheme—an investor sells 100% of the stock of his business to the wrongdoer. If the wrongdoer owns the business at the end of the transaction he has no fear of being sued by himself, so there is no risk of a second suit at all. In these circumstances, the underlying purpose of the standing objection evaporates.

Defendants should not be permitted to take these defensive rules, intended to avoid duplicative litigation, and turn them into an offensive means to escape liability for illegal conduct. *See Maiz v. Virani*, 253 F.3d 641, 654-57 (11th Cir. 2001) (holding shareholder had standing to pursue RICO claims because rationale for general rule barring standing—to prevent double recovery—did not apply under the facts presented).

D. Plaintiff Massood Makes Individual Claims Not Dependent Upon "Lost Value" in Wilson-Curtis Shares in Counts III and V of the First Amended Complaint

Though Massood believes the Eighth Circuit erred in affirming the District Court's dismissal of all of his claims, at the very least the dismissal of Massood's claims in Counts III and V of the First Amended Complaint should be reversed. While "'RICO standing will not arise solely because one is a shareholder . . . in a company that [is a] target of [an] alleged RICO violation'[,] it does not necessarily follow that he lacks standing to seek RICO damages in his own right." *Maiz*, 253 F.3d at 654-55 (quoting *Bivens Gardens Office Bldg., Inc. v. Barnett Banks of Fla., Inc.*, 140 F.3d 898, 906 (11th Cir. 1998)).

In *Maiz*, the Eleventh Circuit granted plaintiffs standing on some of their claims because they were not seeking damages "'solely' on the ground that they were shareholders . . . of the [injured] corporations." *Id.* at 657. This is the case with regard to Massood's claims in Counts III and V.

In Count III, Massood seeks to recover for the damages he suffered as a result of defendants' acquiring an interest in or maintaining control over an enterprise through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(b). In Count V, Massood alleges he was injured as a result of defendants' conspiracy to violate the RICO statute. This violation injured Massood individually—separate and apart from his status as a shareholder of Wilson-Curtis. Therefore,

his claims made pursuant to §§ 1962(b) and (d) of the RICO statute should not be dismissed based upon the District Court's derivative standing analysis.

In the First Amended Complaint, Massood alleged that the "[d]efendants used these funds to eliminate Viacom's competitors . . . increasing their hold on the marketplace [which] . . . in turn, made it more difficult [for Massood] to compete with Viacom." This is an individual injury not owned by Wilson-Curtis. Massood suffered this injury when defendants acquired and maintained control over Wilson-Curtis in violation of § 1962(b) as alleged in Count III.

Though he sold Wilson-Curtis, Massood remains an active billboard entrepreneur in the Kansas City metropolitan area, in Salt Lake City, and in Boise, Idaho. Because the defendants improved their competitive position vis-à-vis Massood through their pattern of racketeering, Massood is entitled to recover for his resulting injuries. *See Wilson v. Askew*, 709 F. Supp. 146, 153 (W.D. Ark. 1989); GREGORY P. JOSEPH, CIVIL RICO: A DEFINITIVE GUIDE 31 n.5 (2d ed. 2000).

Indeed, the Eighth Circuit has held that shareholder-plaintiffs should not be barred from pursuing such a "direct, personal [claim] . . . even [where a] corporation's rights are also implicated." *Heart of Am. Grain Inspection Serv., Inc. v. Mo. Dep't of Agric.*, 123 F.3d 1098, 1102 (8th Cir. 1997) (holding that as shareholders were "prevented from practicing their trade" they were separately though concurrently injured and had standing to bring suit). Likewise, Massood is entitled to recover for the conspiracy

alleged in Count V, at least as to the conspiracy to violate subsections (b) and (c) of 1962.

This Court should grant certiorari and vacate the Eighth Circuit's judgment affirming the District Court's dismissal of Massood's RICO claims for lack of standing with instructions to remand Massood's claims to the District Court for trial.

CONCLUSION

The Court should grant this petition for certiorari and either schedule argument or vacate the Eighth Circuit's opinion and remand to the Eighth Circuit for reconsideration in light of *Bridge*, and grant such other relief as is just.

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 06-3335
Craig Outdoor Advertising, Inc.; Curtis Massood; Midwest Outdoor Media, LLC; Patriot Outdoor, LLC,
Plaintiffs-Appellees,

v.

Viacom Outdoor, Inc.;
Defendant,

Wally Kelly;
Defendant-Appellant,

Randall F. Romig; Randy Jackson; Harold Gustin; CPA Carlton Beckstrom,
Defendants.

No. 06-3337
Craig Outdoor Advertising, Inc.; Curtis Massood; Midwest Outdoor Media, LLC; Patriot Outdoor, LLC,
Plaintiffs-Appellees,

v.

Viacom Outdoor, Inc.,
Defendant-Appellant,

Wally Kelly; Randall F. Romig; Randy Jackson; Harold Gustin; CPA Carlton Beckstrom,
Defendants.

No. 06-3339

Craig Outdoor Advertising, Inc.; Curtis Massood; Midwest Outdoor Media, LLC; Patriot Outdoor, LLC,
Plaintiffs-Appellees,

v.

Viacom Outdoor, Inc.; Wally Kelly; Randall F. Romig; Randy Jackson, Defendants,

Harold Gustin, Defendant-Appellant, CPA Carlton Beckstrom,
Defendant.

No. 06-3341
Craig Outdoor Advertising, Inc.; Curtis Massood; Midwest Outdoor Media, LLC; Patriot Outdoor, LLC,
Plaintiffs-Appellants,

v.

Viacom Outdoor, Inc.; Wally Kelly,
Defendants-Appellees,

Randall F. Romig; Randy Jackson,
Defendants,

Harold Gustin,
Defendant-Appellee,

CPA Carlton Beckstrom,
Defendant.

Appeals from the United States District Court for the Western District of Missouri.

October 15, 2007, Submitted

June 4, 2008, Filed

Before BYE, BOWMAN, and SMITH, Circuit Judges.

OPINION

BOWMAN, Circuit Judge.

Craig Outdoor Advertising, Inc., Midwest Outdoor Media, LLC, Patriot Outdoor, LLC (collectively "Plaintiffs"), and Curtis Massood, the former owner of a small billboard company, filed this lawsuit in which they alleged that Viacom Outdoor ("Viacom"), and Viacom executives Wally Kelly and Harold Gustin (collectively "individual Defendants")[1] perpetrated a scheme by which Viacom and its employees and consultants would represent to businesses and individuals interested in constructing billboards on railroad property that Viacom was acting as the agent for those railroads with respect to billboard construction and that applications to build on railroad property would be evaluated on a first-come, first-served basis. In reality, however, Viacom employees or consultants reviewed each site application to determine if Viacom wanted to develop the site itself. Plaintiffs and Massood alleged that Viacom misrepresented and omitted information about the review process in an effort to induce them to identify billboard sites. Viacom then appropriated certain sites and covered up the scheme, for example, by falsely stating that another entity had applied for the site first or by failing to forward the site application to the railroad. Plaintiffs and Massood asserted claims for relief based on both Missouri and Connecticut state

law and the civil remedies provisions of the Organized Crime Control Act of 1970, Racketeer Influenced and Corrupt Organizations, ("RICO"). 18 U.S.C. §§ 1961-68. Prior to trial, the District Court granted Viacom summary judgment on the RICO claims asserted by Plaintiffs against the company and dismissed all of Massood's claims. A jury returned verdicts in favor of Plaintiffs on their state-law claims and on their RICO claims against Kelly and Gustin. Viacom, Kelly, and Gustin appeal and Plaintiffs and Massood cross-appeal. The parties raise numerous claims, each of which we will address in turn.

I. VIACOM

A. Fraud Claims. Viacom first argues that the evidence was insufficient to support the jury's verdict in favor of Plaintiffs on their state-law fraud claims. A jury verdict is entitled to extreme deference, *Morse v. S. Union Co.*, 174 F.3d 917, 922 (8th Cir.), cert. dismissed, 527 U.S. 1059, 120 S. Ct. 29, 144 L. Ed. 2d 832 (1999), and we will not set it aside unless no reasonable jury could have reached the same verdict based on the evidence submitted, *Ryther v. KARE 11*, 108 F.3d 832, 836 (8th Cir.), cert. denied, 521 U.S. 1119, 117 S. Ct. 2510, 138 L. Ed. 2d 1013 (1997). In conducting our review, we consider the evidence in the light most favorable to the jury verdict. *Id.* Specifically, we "assume all conflicts in the evidence were resolved in [Plaintiffs'] favor, assume [Plaintiffs] proved all facts that [their] evidence tended to prove, and give [Plaintiffs] the benefit of all favorable inferences that reasonably may be drawn from the proven facts." *Morse*, 174 F.3d at 922. Keeping in mind our extremely deferential standard of review, we conclude that the

jury's verdict on Plaintiffs' fraud claims was supported by the evidence.

Plaintiffs asserted fraudulent-misrepresentation claims under Missouri and Connecticut law,[2] pursuant to which they were required to establish the following elements: a false material representation by Viacom; Viacom's knowledge of the representation's falsity or ignorance of its truth; Viacom's intent that Plaintiffs act on the representation "in a manner reasonably contemplated"; Plaintiffs' ignorance of the representation's falsity; Plaintiffs' rightful reliance on the truth of the representation; and proximate injury. *Norden v. Friedman*, 756 S.W.2d 158, 164 (Mo. 1988); see *Nazami v. Patrons Mut. Ins. Co.*, 280 Conn. 619, 910 A.2d 209, 214 (Conn. 2006) (noting that a fraud claim requires proof that (1) the defendant made a false representation as a statement of fact, (2) the defendant knew the statement was untrue, (3) the defendant made the statement to induce reliance, and (4) the other party relied on the statement to his detriment).

In addition to claims that Viacom fraudulently misrepresented the review process, Plaintiffs also asserted that Viacom's failure to disclose the true nature of the review process constituted a fraudulent omission. Viacom argues that the fraudulent-omission theory should not have been submitted to the jury because, "as a matter of law, Viacom had no duty to disclose" the existence or details of its review process. Br. of Viacom at 31. Under Missouri and Connecticut law, silence may constitute a representation for purposes of a fraud claim if the party sought to be held accountable for fraud conceals material facts that he had a legal duty to disclose. *VanBooven v. Smull*, 938

S.W.2d 324, 328 (Mo. Ct. App. 1997) (per curiam); *Ceferatti v. Boisvert*, 137 Conn. 280, 77 A.2d 82, 84 (Conn. 1950). A legal duty to disclose may arise from a relationship of trust or confidence, an inequality of condition, or superior knowledge that is not reasonably available to the other party. *VanBooven*, 938 S.W.3d at 328; see *Glazer v. Dress Barn, Inc.*, 274 Conn. 33, 873 A.2d 929, 961-62 (Conn. 2005). Under Connecticut law, whether a duty to disclose exists is a question of law. See *Glazer*, 873 A.2d at 961. Under Missouri law, "'[w]hether or not a duty to disclose exists . . . must be determined on the facts of the particular case.'" *Hess v. Chase Manhattan Bank, USA,*, 220 S.W.3d 758, 765 (Mo. 2007) (quoting *Ringstreet Northcrest, Inc. v. Bisanz*, 890 S.W.2d 713, 720 (Mo. Ct. App. 1995)). Before we consider the sufficiency of the evidence to support the jury's fraud verdicts, we will address Viacom's argument that it had no duty to disclose details of the review process.

First, the evidence established that Viacom possessed superior knowledge with respect to its review process. Viacom had been engaged by the railroads to operate as their leasing agent and was, by virtue of that position, the gatekeeper for billboard site applications. Plaintiffs, as applicants for railroad billboard sites, had no choice but to submit their applications, including detailed descriptions of site locations, to Viacom for processing. And only Viacom was in a position to know that its application-processing procedures included an internal review by a local Viacom office and a determination by that office of whether a particular site should be appropriated by Viacom or released to an applicant. Kelly testified that Viacom employed a first-come, first-served policy for railroad billboard applications *except*

in areas where Viacom operated, in which case applications would be reviewed by the local office. See, e.g., Tr. at 1464.

Second, the evidence established that Viacom's superior knowledge of the review process was not reasonably available to Plaintiffs. Viacom did not inform Plaintiffs that their applications would be subjected to the review process. Nor did Viacom inform Plaintiffs that the sites identified in their applications could be appropriated by Viacom if the site was deemed desirable by a local office. Plaintiffs and other applicants, as well as representatives from the railroads, testified that as far as they knew, Viacom was operating strictly as an agent for the railroads in processing these applications and not as a competitor for the sites. Jim Boeh (Midwest Outdoor), Mark Derench (Patriot Outdoor), and Craig Fedynich (Craig Outdoor) testified that they asked Viacom employees whether competing applications had already been submitted for their proposed sites, and they were told that no such applications had been received. Id. at 605-06; 239-40; 420. Viacom did not inform Boeh, Derench, or Fedynich that their applications would be reviewed and that their sites could be appropriated by Viacom. Accordingly, Boeh, Derench, and Fedynich submitted applications with the understanding that Viacom would process those applications on a first-come, first-served basis. Viacom argues that it had no duty to disclose its review process because it was operating as a competitor in an arm's-length transaction for any given site. This argument was rejected by the jury, which credited Plaintiffs' testimony that they submitted their applications to Viacom because Viacom was the leasing agent of the railroads, and they did not consider Viacom

a competitor with respect to their site applications. In these circumstances, we conclude that Viacom possessed superior--indeed sole--knowledge of the review process and that this information was material and was not reasonably available to Plaintiffs. Thus, Viacom had a duty under both Connecticut and Missouri law to disclose such information.

We now address Viacom's claims that the evidence was insufficient to support the jury's verdicts on Plaintiffs' fraud claims. The jury heard testimony from Derench that in the spring of 2002, he inquired of Tom Rende, a Viacom employee, whether Viacom had received any applications for billboard sites in the general vicinity of two sites Derench had identified on Boston and Maine ("B&M") railroad property along I-84 in Waterbury, Connecticut. Rende assured Derench that there had been no such applications. Based on this discussion, Derench, on behalf of Patriot Outdoor, submitted his applications, believing that he would be first in line for the billboard sites identified therein. Derench also testified that when he inquired about the status of his applications, Rende assured him that they were under consideration by the railroad when, according to Derench, the applications had not been forwarded to B&M and were instead under review by Viacom's local office for possible appropriation by Viacom. Derench further testified that based on Rende's repeated assurances that his site applications were being considered by B&M, Derench did not pursue potential sites on nearby, privately-owned property. See Tr. at 704 ("I would have [gone] next door . . . and gone to the south side."). Eventually, Derench was awarded one of the sites he had identified, and Viacom awarded the other site to itself. The jury was entitled to conclude

from this evidence that (1) Rende misled Derench into submitting site applications by implying to Derench that Viacom employed a first-come, first-served policy; (2) pursuant to Viacom's undisclosed review process, Rende forwarded Derench's applications to Viacom's offices for internal review; (3) Rende falsely assured Derench that his applications had been submitted to the railroad; and (4) Viacom eventually appropriated one of the sites identified by Derench. Based on the evidence submitted, we cannot say that no reasonable jury could have found Viacom liable with respect to Patriot's Connecticut fraud claims.

The jury heard testimony that in September 2001, Boeh, on behalf of Midwest Outdoor, submitted applications for two potential billboard sites on Kansas City Southern ("KCS") railroad property along Highway 150 in Missouri. Prior to submitting these applications, Boeh contacted Viacom employee Randy Romig, who stated that there were no applications pending for sites in that area and that "it was first-come, first-served, and that if [Boeh was] there first, the location would likely be" his. Tr. at 230. Despite the apparent absence of competing applications, no action was taken on Boeh's applications for the remainder of 2001 and most of 2002. Boeh called Viacom numerous times inquiring about the delay, and Rende told Boeh that the railroad, not Viacom, was responsible for the holdup. Unbeknownst to Boeh, Rende had forwarded Boeh's applications to Viacom's Kansas City office pursuant to the internal review process. In the meantime, frustrated by the length of the delay and dissatisfied with the answers provided by Rende, Boeh contacted KCS directly in December 2002 and January 2003. The railroad told Boeh that it had approved one of

the two sites months earlier. Assuming that one of his applications had all the necessary approvals, Boeh called Rende for an explanation regarding the delay in notification. Rende told Boeh that he would investigate. On March 21, 2003, however, Boeh received a letter stating that due to Boeh's "lack of activity" on the two site applications, Viacom had denied them both. Id. at 251. Only later did Boeh learn that Viacom had awarded one of the Highway 150 sites to itself while the second site was "spaced out"[3] by another competitor. Boeh testified that had he known the status of his applications, he "would have had the opportunity to go next door" to request permission to construct his billboard on property owned by a lumberyard. Id. at 312. The jury was entitled to conclude from this evidence that (1) Boeh was misled into submitting site applications by Romig's assurance that Viacom employed a first-come, first-served policy; (2) pursuant to Viacom's undisclosed review process, Boeh's applications were forwarded to Viacom's Kansas City office for internal review; (3) Rende falsely implied to Boeh that his applications had been delayed by the railroad; (4) Boeh was falsely informed that his applications had been denied based on Boeh's inaction; and (5) Viacom eventually appropriated one of the sites identified by Boeh. Based on the evidence presented, a reasonable jury could have ruled in favor of Midwest Outdoor on its Missouri fraud claims.

The jury heard testimony that in June 2002, Fedynich, on behalf of Craig Outdoor, called Viacom's Kansas City office to inquire about the procedure for obtaining permission to construct a billboard on Burlington Northern Sante Fe Railway ("BNSF") property along I-670. Viacom's local representative, David Hyatt, told

Fedynich that if Viacom received competing applications for a railroad site, "whoever applied first" would receive a permit. Id. at 420. Hyatt also told Fedynich that Viacom's "railroad management" function was "totally separate" from Viacom's outdoor billboard function and that the two departments "[didn't] share information" and "[did] not communicate." Id. On July 17, 2002, Fedynich applied for a site on the north side of I-670. On August 14, 2002, Viacom issued a letter authorizing Fedynich to pursue a state permit but cautioning that he could not begin construction on the site until Viacom forwarded his application to BNSF, the railroad approved the site, and Viacom issued a lease approval to Fedynich. On August 15, 2002, Fedynich submitted another application to Viacom for a site on railroad property along the south side of I-670. After this application was submitted, Hyatt told David Gilley, then a Viacom employee and later a whistleblower and Plaintiffs' witness, that the Kansas City office did not want Fedynich to obtain a permit for the south I-670 site because Viacom intended to relocate one of its existing billboards to a nearby location and did not want to be "spaced out." On August 22, 2002--one week after Fedynich submitted his application for the south I-670 site--Hyatt submitted an application for the same site on behalf of Viacom's Kansas City office. Viacom issued an authorization letter to Hyatt on the same day his application was submitted. On August 27, 2002, Fedynich received a letter from Viacom denying his application for the south I-670 site because of purported ongoing engineering concerns. Gilley testified that the engineering-concerns rationale was a reference to a dispute between Viacom and BNSF over responsibility for paying an engineering firm's invoices that was

nothing more than a "smoke screen" Viacom was using to delay applications. Id. at 106. In contrast, Viacom presented testimony that the dispute with BNSF over the engineering invoices was the true cause for delay in processing site applications, including Fedynich's. While Fedynich's I-670 applications were pending, local ordinances regarding the spacing of billboards at his proposed locations changed, and Fedynich was thereafter prevented from constructing billboards at the sites he originally identified. Fedynich testified that if he had known about Viacom's review process, he "would probably [have gone] next door to the . . . property owner" or "to another railroad" to apply for permission to construct his billboards. Id. at 450. The jury was entitled to conclude from this evidence that (1) Hyatt misled Fedynich into submitting site applications by telling him that Viacom employed a first-come, first-served policy and kept its railroad management and billboard operations separate; (2) pursuant to Viacom's undisclosed review process, Hyatt reviewed Fedynich's applications on behalf of Viacom's Kansas City office; (3) Viacom denied Fedynich's applications based on an artificial "engineering concerns" rationale; and (4) Viacom eventually appropriated the sites identified by Fedynich. Based on this evidence, a reasonable jury could have arrived at a verdict against Viacom with respect to Craig Outdoor's Missouri fraud claims.

Considering the evidence in the light most favorable to the jury verdict, assuming all conflicts in the evidence were resolved in Plaintiffs' favor, and giving Plaintiffs the benefit of all reasonable inferences that may be drawn from the evidence, we conclude that the jury's verdict on Plaintiffs' state-law fraud claims was supported by the evidence.[4]

B. Evidentiary Issues. Viacom challenges several of the District Court's evidentiary rulings. First, Viacom argues that the District Court erred by permitting Mike Twidle, an employee of Guilford Transportation, the parent company of B&M railroad, and David Schneider, an employee of BNSF railroad, to testify regarding their understanding of the relationship between Viacom and their respective railroad employers. Neither Twidle nor Schneider was called to testify as an expert witness, and Viacom argues that it was improper to permit these witnesses to testify to Viacom's contractual relationship with the railroads, such testimony being irrelevant and unfairly prejudicial. Plaintiffs respond that the lay-opinion testimony of Twidle and Schneider was admissible to rebut the testimony of the Viacom witnesses who asserted that Viacom's agreements with the railroads gave Viacom the unfettered right to appropriate any railroad billboard site identified in an application submitted to Viacom. Viacom also asserts that the District Court erred by permitting site applicants other than Plaintiffs to testify regarding their experiences with Viacom during the application process, again arguing that this testimony was irrelevant and unfairly prejudicial.

We review a district court's evidentiary decisions for abuse of discretion, according such decisions substantial deference. *Wactor v. Spartan Transp. Corp.*, 27 F.3d 347, 350 (8th Cir. 1994). A non-expert witness may testify to opinions or inferences that are "(a) rationally based on the perception of the witness, (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on

scientific, technical, or other specialized knowledge." Fed. R. Evid. 701.

Twidle first described his employment experience and duties with the railroad, which included managing B&M's relationship with Viacom and reviewing billboard site applications forwarded by Viacom to the railroad for approval. Schneider testified regarding his experience in railroad real estate management, which included "sales, easements, leases, permits, [and] track leases" for BNSF, as well as billboard site review and approval. Tr. Vol. 7 Attach. D at 1. After establishing the witnesses' pertinent work experience and the bases for their opinions, Plaintiffs elicited testimony from Twidle and Schneider that it was industry practice for railroad leasing agents such as Viacom to employ a first-come, first-served policy with respect to railroad billboard site applications, that Viacom's internal review process was outside the industry norm and contrary to their expectations as representatives of their respective railroad employers, and that it was not fair for Viacom to surreptitiously review applications and appropriate sites.

It was within the District Court's discretion to admit the testimony of Twidle and Schneider: they had personal knowledge of the railroad billboard industry, their testimony was helpful to a clear understanding of the facts and issues presented in the case, and their testimony did not involve specialized scientific or technical knowledge. See *Burlington N. R.R. Co. v. Nebraska*, 802 F.2d 994, 1005 (8th Cir. 1986) (concluding that railroad executives' lay-opinion testimony was admissible because it was based on their "knowledge derived from supervising railroad

operations, years of experience in the industry, and review of employee accident reports prepared in the ordinary course of business"). Furthermore, we agree with Plaintiffs that this testimony was properly admitted to refute the testimony of Viacom witnesses who opined that Viacom's review process was permissible under the terms of Viacom's contracts with the railroads. See *Gossett v. Weyerhaeuser Co.*, 856 F.2d 1154, 1156 (8th Cir. 1988) (noting district court's discretion to permit a plaintiff to negate in rebuttal, as opposed to case in chief, facts and theories raised by defense). The District Court's decision to admit Twidle and Schneider's lay-opinion testimony was not an abuse of its considerable discretion.

Viacom also challenges the District Court's decision to permit site applicants other than Plaintiffs to testify regarding their experiences with Viacom during the application process. Viacom argues that this evidence was irrelevant and unfairly prejudicial. We disagree. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed. R. Evid. 401. All relevant evidence is admissible unless "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Fed. R. Evid. 403. "A district court is afforded wide latitude in determining issues of relevancy . . . ." *Suggs v. Stanley*, 324 F.3d 672, 682 (8th Cir. 2003).

John Lockridge, Nathan Simmons, Steve Anderson, and Joseph Murray, each a billboard business owner, testified that their applications for railroad billboard sites were subjected to the same undisclosed internal review process that Viacom conducted on Plaintiffs' site applications.[5] Lockridge testified that after Viacom failed to explain the delay in processing his site applications, he contacted Norfolk Southern railroad directly and only then learned that the railroad had approved his applications months earlier. Plaintiffs proffered copies of Lockridge's site applications on which a Viacom employee had noted, "Atlanta has interest. Atlanta to research" the sites identified by Lockridge. Tr. at 945-46. Simmons testified that he applied to Viacom for six sites on property in Georgia owned by CSX railroad, but was informed by Viacom that permits had already been issued to another applicant for five of those six sites. When Simmons later researched the sites with the Georgia Department of Transportation, he discovered that no permits had been issued. In fact, CSX had approved four of Simmons's site applications, but Viacom had not notified Simmons that he had received railroad approval. Consequently, Simmons testified, he was prevented from building on those sites. Anderson testified that he submitted applications to Viacom for three railroad billboard sites in October 2001. Viacom reviewed those applications and thereafter obtained permission from the railroad to construct a billboard that effectively "spaced out" two of the sites identified by Anderson. Murray testified that he applied to Viacom's predecessor for two billboard sites along Amtrak property in Boston. Once Viacom took over, Murray's applications were stalled, and when Murray contacted Amtrak officials for an explanation, he was

told that Viacom officials had instructed Amtrak officials "not to talk" to Murray about the applications. Id. at 1271. After Murray filed a lawsuit against Amtrak and Viacom, his applications were approved, and Murray dropped his lawsuit.

The District Court rejected Viacom's objections that this testimony was irrelevant and unfairly prejudicial. We likewise reject Viacom's arguments. In short, the District Court was in the best position to determine the relevance and potential prejudice of the evidence regarding Viacom's conduct in processing the applications submitted by Lockridge, Simmons, Anderson, and Murray, and we cannot say that the court abused its considerable discretion by admitting this testimony.

C. Damages Issues--Fraud. Viacom next argues that because Plaintiffs failed to satisfy the elements necessary to recover on a benefit-of-the-bargain damages theory, the damages awarded by the jury on Plaintiffs' fraud claims were not recoverable as a matter of law. Plaintiffs respond that Viacom misstates their theory of recovery and thereby misconstrues the basis on which the jury's damages award rests.

The District Court based its damages instruction on Missouri Approved Jury Instruction (MAI) 4.01, which states:

If you find in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained [and is reasonably certain to sustain

in the future] as a direct result of the occurrence mentioned in the evidence.

Mo. Supreme Court Comm. on Jury Instructions, Missouri Approved Jury Instructions 48 (Stephen H. Ringkamp & Richard E. McLeod eds., West 6th ed. 2002) (footnote omitted).

Viacom correctly notes that in a case alleging fraud, a court typically charges the jury with a benefit-of-the-bargain instruction--described in MAI 4.03--as the correct measure of damages. See *Heberer v. Shell Oil Co.*, 744 S.W.2d 441, 443 (Mo. 1988); see also *Leisure Resort Tech., Inc. v. Trading Cove Assocs.*, 277 Conn. 21, 889 A.2d 785, 793 (Conn. 2006). What Viacom fails to note, however, is that the use of other measures of damages may be permitted where the peculiar circumstances of the fraud make benefit-of-the-bargain damages an inadequate or inappropriate measure. See *Cent. Microfilm Serv. Corp. v. Basic/Four Corp.*, 688 F.2d 1206, 1220 (8th Cir. 1982) (applying Missouri law), cert. denied, 459 U.S. 1204, 103 S. Ct. 1191, 75 L. Ed. 2d 436 (1983); *Schroeder v. Zykan*, 255 S.W.2d 105, 110-11 (Mo. Ct. App. 1953); *Kilduff v. Adams, Inc.*, 219 Conn. 314, 593 A.2d 478, 480, 483 (Conn. 1991) (affirming award of "economic damages" on fraud claim where plaintiffs did not pursue options to protect home from foreclosure because defendant lienholder said he did not intend to foreclose and noting that plaintiff was entitled to recover consequential damages resulting directly from fraud). The District Court did not instruct the jury on benefit-of-the-bargain damages because, according to Plaintiffs, they did not proceed on a benefit-of-the-bargain theory. Rather, the court instructed the jury to award fair and just compensation for the harm suffered

by Plaintiffs on account of Viacom's culpable conduct. If Viacom believed that the court's damages instruction was an improper statement of Plaintiffs' theory of recovery or was otherwise in error, it was Viacom's obligation to object--and Viacom did not do so.[6] Fed. R. Civ. P. 51(d)(1)(A) (noting that a party may assert an instructional error only if that party "properly objected"); *Dupre v. Fru-Con Eng'g Inc.*, 112 F.3d 329, 334 (8th Cir. 1997) ("Our law on this subject is crystal clear: to preserve an argument concerning a jury instruction for appellate review, a party must state distinctly the matter objected to and the grounds for the objection on the record."). We perceive no error in the District Court's instructions to the jury on Plaintiffs' damages claim.

Viacom faults the admission of Plaintiffs' testimony regarding the monetary effect of Viacom's conduct on their businesses. Specifically, Viacom contends that the District Court improperly permitted Plaintiffs to testify about the value of the billboards they were prevented or restricted from erecting as a result of Viacom's fraudulent conduct. Testimony on this subject, according to Viacom, requires specialized, expert knowledge. We have considered Viacom's arguments and find them unpersuasive. A district court's evidentiary rulings are entitled to substantial deference, so we review such rulings only for abuse of discretion. *Wactor*, 27 F.3d at 350; see *Spencer v. Young*, 495 F.3d 945, 950 (8th Cir. 2007) (noting that federal evidentiary rules provide standards for admissibility of evidence in diversity cases). A business owner may be permitted to testify to the damage he perceives has been done to his business as the result of another's actions. See e.g., *BBSerCo, Inc. v. Metrix Co.*,

324 F.3d 955, 963 (8th Cir. 2003) (concluding that district court did not abuse its discretion by admitting damages testimony from business owner with thirteen years' experience in industry). Viacom had the opportunity to present its own evidence to refute the Plaintiffs' damages evidence. See, e.g., *Spencer v. Stuart Hall Co.*, 173 F.3d 1124, 1128 (8th Cir. 1999) ("Where conflicting evidence is presented at trial, it is the jury rather than this court which assesses the credibility of the witnesses and decides which version to believe."). Moreover, as discussed above, Viacom did not object to the District Court's jury instruction regarding the calculation of damages. In sum, we believe that Plaintiffs presented a submissible case on the issue of damages related to their fraud claims and that there was ample evidence presented at trial to support Plaintiffs' fraud theories. The District Court did not err in its instructions to the jury on the calculation of damages, and the jury's damages award was supported by the evidence.

D. Tortious-Interference Issues. Viacom next argues that Plaintiffs' tortious-interference claims amount to impermissible contentions that Viacom interfered with its own contracts.[7] The District Court instructed the jury that Plaintiffs could prevail on their tortious-interference claims only if they proved that (1) each had a valid reasonable prospect of obtaining permission to build, sell, or lease billboards on railroad property; (2) Viacom was aware of each Plaintiff's expectation or opportunity; (3) Viacom unjustifiably interfered with each Plaintiff's expectation or opportunity; and (4) each Plaintiff suffered damages as a result. Instr. No. 35. Viacom did not object to this instruction at trial, and Viacom does not attempt to raise such an objection on

appeal. Rather, Viacom argues that the evidence was insufficient to support the jury's verdict on this claim. [8] As noted previously, we will reverse a jury's verdict only if, "after viewing the evidence in the light most favorable to the verdict, we conclude that no reasonable juror could have returned a verdict" for Plaintiffs. *Ryther*, 108 F.3d at 836.

Contrary to Viacom's assertions, Plaintiffs were not seeking a business relationship with Viacom, except to the extent that Plaintiffs expected Viacom to fulfill its role as an agent of the railroads, forward Plaintiffs' site applications to the appropriate railroad for consideration, inform Plaintiffs of the railroad's decision, and issue any necessary permits in conformance with the railroad's approval of the proposed site. Plaintiffs were seeking business relationships with the railroads--the actual owners of the property on which Plaintiffs wished to obtain permission to construct billboards. Plaintiffs' evidence established that Viacom misled them into believing that Viacom--an agent of the railroads--employed the industry-standard first-come, first-served method for processing applications when, in fact, Viacom was surreptitiously reviewing site applications, improperly delaying action on those applications, and appropriating those billboard sites that Viacom considered financially or strategically desirable. The evidence supported the jury's finding that Viacom recognized the commercial potential in the sites identified by Plaintiffs and, in an effort to exploit that potential, prevented or delayed Plaintiffs from obtaining permission to construct billboards on those sites. Viacom argues that Plaintiffs failed to identify a single potential purchaser or advertiser for the billboards Plaintiffs sought

permission to construct. In both Missouri and Connecticut, however, all that is required is proof of a *reasonable probability or expectancy* of entering into a business relationship--as opposed to an actual business relationship--to establish the proof necessary to support a tortious-interference claim. See *Am. Bus. Interiors, Inc. v. Haworth, Inc.*, 798 F.2d 1135, 1143 (8th Cir. 1986) (applying Missouri law); *Dreamcatcher Software Dev., LLC v. Pop Warner Little Scholars, Inc.*, 298 F. Supp. 2d 276, 287 (D. Conn. 2004) (applying Connecticut law). Plaintiffs satisfied their burden of proof.

Viacom also argues that pursuant to the jury instructions, Plaintiffs had to prove that Viacom was aware of a Plaintiff's intent to *build* on a particular site. According to Viacom, proof that Viacom was aware of a Plaintiff's intent to *resell* a site to a third party rather than construct a billboard itself was inadequate to prove tortious interference. We reject this argument. The jury was instructed to return a verdict for Plaintiffs on their tortious-interference claim if Plaintiffs had a valid business expectation or opportunity "to gain financial benefits from *leasing or selling* the proposed billboard sites." Instr. No. 35 (emphasis added). The jury reasonably concluded that Plaintiffs satisfied this element of their claim. Based on our review of the record, we cannot fault this conclusion.

In short, Plaintiffs presented sufficient evidence for a reasonable jury to conclude that had Viacom properly fulfilled its role as an agent of the railroads, Plaintiffs would have had a reasonable opportunity to enter into a business relationship with the railroads to construct billboards on the sites at issue. Accordingly, we decline

to reverse the jury's verdict on Plaintiffs' tortious-interference claim.

E. Unfair-Competition Issues. Viacom contends that Plaintiffs failed to prove the elements of their unfair-competition claim, namely, that Plaintiffs communicated a trade secret to Viacom, Viacom was in a position of trust and confidence with Plaintiffs, and Viacom used the trade secret, thereby causing Plaintiffs damage. Instr. No. 37. Again, Viacom asks us to reverse the jury's verdict, an extreme remedy that we will grant only if, after viewing the evidence in the light most beneficial to Plaintiffs, we conclude that no reasonable jury could have returned a verdict in Plaintiffs' favor. See *Ryther*, 108 F.3d at 836.

According to Viacom, Plaintiffs and Viacom were engaged in arm's-length business relationships with respect to the billboard sites at issue. Therefore, Viacom was not in a position of trust and confidence with Plaintiffs and their claims must fail. We disagree with Viacom's characterization of its relationship with Plaintiffs. As discussed above, Plaintiffs interacted with Viacom as a matter of necessity because Viacom represented itself as the agent of the railroads for billboard-construction permits. Plaintiffs reasonably relied on Viacom to treat their site applications in good faith, forward those applications to the railroads in a timely fashion, notify Plaintiffs of a railroad's decision, and issue any necessary permits in accordance with that railroad's decision. See *Steinberg v. Fleischer*, 706 S.W.2d 901, 908 (Mo. Ct. App. 1986) (reasoning that parties were "experienced businessmen" and did not have a fiduciary relationship); *Hi-Ho Tower, Inc. v. Com-Tronics, Inc.*, 255 Conn. 20, 761 A.2d 1268, 1279-80

(Conn. 2000) (defining an arm's-length business relationship as lacking a relationship of dominance and dependence). Viewing the evidence in the light most favorable to the jury's verdict, we conclude that the evidence was sufficient for a reasonable jury to find that Viacom was in a position of trust and confidence with Plaintiffs with respect to the site applications.

Viacom next argues that Plaintiffs failed to prove that they communicated trade secrets when they identified their proposed billboard sites in applications submitted to Viacom. Rather, according to Viacom, these sites were public knowledge easily identifiable by any billboard-industry professional. While it may be true that easily ascertainable information does not constitute a trade secret, see *W. Forms, Inc. v. Pickell*, 308 F.3d 930, 933-34 (8th Cir. 2002) (applying Missouri law); *Town & Country House & Homes Serv., Inc. v. Evans*, 150 Conn. 314, 189 A.2d 390, 393 (Conn. 1963), the testimony in this case was sufficient for the jury to conclude that a billboard professional discovers desirable urban billboard sites on railroad property only after extensive, time-consuming research and such information is entitled to protection. Viacom also argues that Plaintiffs made no effort to maintain the secrecy of their billboard sites because Plaintiffs disclosed the locations of those sites in their applications. This argument is without merit. Plaintiffs disclosed the site locations because they were required to do so in order to obtain permission to construct billboards on those sites. Viewing the evidence in the light most favorable to Plaintiffs, we cannot say that the evidence was insufficient for a reasonable jury to find that Plaintiffs communicated trade secrets in their

applications to Viacom for the railroad billboard sites at issue.

Viacom also argues that Plaintiffs' unfair-competition claims fail because Viacom did not "use the I-84 and I-670 sites in any way, let alone to cause Plaintiffs harm." Br. of Viacom at 55. We disagree. The evidence was sufficient to establish that Viacom "used" the billboard sites identified by Plaintiffs by, among other things, constructing Viacom billboards on those sites, delaying notification to Plaintiffs after a railroad approved a proposed site, or "spacing-out" Plaintiffs' proposed sites by constructing billboards nearby. The jury found that these wrongful activities caused Plaintiffs to suffer economic damage. The jury heard Viacom's evidence to the contrary that, for example, a "logjam" of pending applications at BNSF caused delay in processing applications, that Plaintiffs' failure to comply with local billboard-spacing regulations caused the denial of their applications, and that Derench's alleged forgery in a state license application caused him to lose one of the sites he identified. Having heard all the evidence, the jury elected to credit Plaintiffs' testimony over Viacom's on these issues. See *Spencer*, 173 F.3d at 1128 (noting that the jury, not this court, resolves conflicts in evidence). Mindful of our extremely deferential standard of review for jury verdicts, we cannot say that the jury's verdict on Plaintiffs' unfair-competition claim was unsupported by the evidence.

F. Punitive-Damages Issues. Viacom raises a number of claims with respect to the jury's award of punitive damages. First, Viacom argues that the punitive-damages award must be reversed because there was no evidence of an "evil motive" on Viacom's part. The

instructions required, however, that Plaintiffs prove conduct that was "outrageous" *either* "because of [Viacom's] evil motive" *or*because of Viacom's "reckless indifference to the rights of others." Instr. No. 50. The jury was presented with substantial evidence to support its findings that Viacom, allegedly acting in its capacity as an agent for the railroads, either 1) fraudulently represented to Plaintiffs that their applications would be processed on a first-come, first-served basis or 2) failed to disclose to Plaintiffs--or even flatly denied--that Viacom would review Plaintiffs' applications and potentially appropriate the sites identified therein. Plaintiffs also presented evidence sufficient for a jury to conclude that Viacom engaged in this conduct for its financial and strategic benefit. The evidence of Viacom's outrageous conduct in pursuit of its scheme was sufficient for a reasonable jury to award punitive damages.

Next, Viacom contends that under Connecticut law, Patriot could not recover punitive damages because it failed to prove that a managerial-level Viacom employee engaged in culpable conduct. See *Stohlts v. Gilkinson*, 87 Conn. App. 634, 867 A.2d 860, 867-68 (Conn. Ct. App. 2005) (noting that an employer may be liable for punitive damages if a managerial-level employee engages in or approves of an outrageous act). Here, both Wally Kelly, the President of Viacom, and Harold Gustin, a Senior Vice President of Viacom's Land-Lease Division, conceded that the railroad billboard industry generally processes site applications on a first-come, first-served basis. Kelly and Gustin also testified that Viacom's adoption of the review process amounted to an internal business decision that Viacom was not required to share with site applicants. Kelly

testified that he implemented the application review process in 2002 and that he believed the review process was appropriate and permissible under Viacom's contracts with the railroads. Gilley testified that he forwarded for review a list of billboard sites originally identified in third-party applications "in accordance with [Kelly's] directive that the local markets be given a chance to review them for Viacom's use." Tr. at 85 (quoting memo from Gilley to Viacom employees forwarding BNSF sites identified in applications received by Viacom). This evidence was sufficient to establish that at a minimum, local-office managerial-level employees engaged in or condoned the conduct required to support a punitive-damages award.

Viacom also argues that Patriot cannot recover punitive damages because it failed to present evidence of its litigation expenses to the jury as required under Connecticut law. See *Gagne v. Town of Enfield*, 734 F.2d 902, 904 (2d Cir. 1984) (citing Connecticut law under which punitive damages recoverable in some circumstances but are limited to the plaintiff's litigation expenses). Over Viacom's objections, the District Court allowed Patriot to present evidence of its litigation expenses to the court after the jury had returned its verdict. Patriot's counsel attempted to introduce litigation-expense evidence during the trial, but the court ruled that it would allow such evidence "at some time, maybe even after the jury has gone out to deliberate, because it doesn't go to the jury. It just has to be in evidence in the plaintiffs' case." Tr. at 1733. There was additional discussion and legal argument among counsel and the court, and Viacom's counsel ultimately stated that the court's "approach [was] just fine." Tr. at 1735. Because Viacom acquiesced in the

District Court's approach to the introduction of evidence on Patriot's litigation expenses and did not object, Viacom has waived this argument on appeal. See *Evergreen Invs., LLC v. FCL Graphics, Inc.*, 334 F.3d 750, 757 (8th Cir. 2003) (reiterating that a "party may not stand idly by, watching the proceedings and allowing the district court to commit an error on which the party subsequently complains" (citation to quoted case omitted)).

Finally, Viacom argues that the punitive damages awarded by the jury are unconstitutionally excessive. The jury awarded $ 1,044,445 in punitive damages each to Craig Outdoor and Midwest Outdoor, an amount that is eight times the actual damages of $ 125,000 awarded to each Plaintiff. We review de novo a district court's determination regarding the constitutionality of a punitive damages award. *Ross v. Kansas City Power & Light Co.*, 293 F.3d 1041, 1048 (8th Cir. 2002). In deciding whether a punitive damages award is so excessive that it violates due process, we consider the reprehensibility of the defendant's conduct, the disparity between the plaintiff's harm and the punitive damages award, and the difference between the punitive damages award and the civil penalties imposed in comparable cases. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996). The most important of these factors is the reprehensibility of the defendant's conduct. Id. Here, we agree with the District Court that Viacom's conduct was particularly egregious, characterized as it was by "repeated trickery and deceit," with evidence indicating "an enormous company's intent to defraud Plaintiffs because of their limited financial abilities." Order of Dec. 14, 2005, at 10. Although a ratio of actual to

punitive damages in excess of eight to one may be constitutionally suspect, "there are no rigid benchmarks that a punitive damages award may not surpass." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003). We conclude that in this case, given Viacom's deceitful conduct directed at Plaintiffs, the single-digit multiplier comports with due process.[9] Cf. id. ("Our jurisprudence and the principles it has now established demonstrate . . . that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."). In sum, we find no constitutional impediment to the enforcement of the punitive damages award as ultimately determined by the District Court.

II. PLAINTIFFS & MASSOOD

A. Damages Issues. Having addressed Viacom's arguments on appeal, we turn now to Plaintiffs' and Massood's arguments on cross-appeal. Plaintiffs first contend that the District Court erred by refusing to harmonize the damages awards to reflect the jury's true intentions. The verdict forms provided separate blank lines on which to indicate the actual damages awarded to each Plaintiff under each theory of recovery, but the form did not provide a separate blank line on which to indicate the *total* actual damages awarded to each Plaintiff. The jury returned identical verdicts against Viacom on each Plaintiff's three state-law claims (fraud, tortious interference, and unfair competition), and the jury assessed identical actual damages under each of the three theories asserted by each Plaintiff: $ 125,000 for Craig, $ 125,000 for Midwest, and $ 80,000 for Patriot.[10]

After the verdict was returned, Viacom filed a motion seeking formation of the judgment, arguing that because there was a single indivisible injury in the case--the value of the lost and appropriated billboard sites--"entering judgment on the jury's separate damages findings would create impermissible double recovery for Plaintiffs." Defendants' Motion Regarding Formation of Judgment at 1. Plaintiffs filed a response to Viacom's double-recovery arguments, including affidavits they had obtained from each juror to "clear[] up any possible ambiguity created by the form of the verdict." Plaintiffs' Statement Concerning the Jury's Verdict and Motion for Final Judgment at 1. Plaintiffs argued that the verdict forms confused the jury and caused it to mistakenly apportion the total actual damages for each Plaintiff across all three theories each Plaintiff asserted. To give the jury's true intentions effect, the damages amount noted for each separate theory of recovery must be totaled. For example, as to the verdict for Craig Outdoor, Plaintiffs asserted that the jury intended to award actual damages of $ 125,000 for *each* of Craig's state-law theories for a total recovery of $ 375,000. The District Court refused to consider the juror affidavits and rejected Plaintiffs' arguments. Instead, the court entered judgment for total actual damages on the state-law claims in the following amounts: $ 125,000 for Craig Outdoor; $ 125,000 for Midwest Outdoor; and $ 80,000 for Patriot. Plaintiffs appeal this result.

We first address the issue of the juror affidavits. Plaintiffs' counsel obtained these affidavits after the jury was discharged, without notice to opposing counsel, and without permission from the District Court. A district court is generally prohibited from

receiving testimony from jurors after the jury has returned a verdict and has been discharged. Fed. R. Evid. 606(b); *Karl v. Burlington N. R.R. Co.*, 880 F.2d 68, 73 (8th Cir. 1989). A district court may, however, consider juror testimony that because of some oversight or mistake, the verdict announced at trial was not the verdict on which the jurors had agreed. *Karl*, 880 F.2d at 74. In other words, "[t]he admission of a juror's testimony is proper to indicate the possibility of a 'clerical error' in the verdict, but not the 'validity' of the verdict." *Id.* (citation to quoted case omitted). Clerical error might involve, for example, a transposed number in the damages amount set forth on the verdict form. Here, Plaintiffs' charges of mistake or ambiguity in the verdict form cannot be characterized as clerical error. Instead, the affidavits obtained by Plaintiffs purport to explain what the jury meant by its verdict and how the jury determined what numbers to transcribe onto the verdict forms. See id. The District Court did not err in refusing to consider the juror affidavits.

We next address Plaintiffs' assertions that the District Court erred by refusing to harmonize the jury's damages awards. If, as here, a party asserts alternative theories of recovery for the same injury, that party may not recover compensatory damages under each legal theory. Rather, he is only entitled to one compensatory damage award if liability is found on any or all of the theories asserted. *Cole v. Control Data Corp.*, 947 F.2d 313, 320-21 (8th Cir. 1991) (applying Missouri law). The parties agree that each Plaintiff asserted three state-law theories of relief for a single injury: the harm caused by Viacom's scheme to defraud Plaintiffs out of billboard sites identified in applications submitted to

Viacom. Whether the harm caused by Viacom's scheme was the result of fraudulent misrepresentation or omission, unfair competition, tortious interference, or some combination thereof, the parties agree that there is only a single indivisible injury to each Plaintiff and that there may be only a single recovery awarded to each Plaintiff. See *Sellers v. Mineta*, 350 F.3d 706, 713-14 (8th Cir. 2003) ("The law in Missouri is that a plaintiff may not recover duplicate damages for the same harm."); *Mahon v. B.V. Unitron Mfg., Inc.*, 284 Conn. 645, 935 A.2d 1004, 1015 (Conn. 2007) ("Connecticut courts consistently have upheld and endorsed the principle that a litigant may recover just damages for the same loss only once." (citation to quoted cases omitted)).

We agree with the District Court that "[f]rom the face of the verdict forms," the jury intended to award total actual damages of $ 125,000 to Craig Outdoor and Midwest Outdoor and $ 80,000 to Patriot for their respective state-law claims. Order of Dec. 14, 2005, at 4. Nothing in the jury instructions or the verdict forms directed or permitted the jury to allocate the total actual damages amount awarded to a Plaintiff among that Plaintiff's three state-law claims. "Absent evidence to the contrary we presume the jury followed the instructions it was given." *Sloan v. Motorists Mut. Ins. Co.*, 368 F.3d 853, 856 (8th Cir. 2004). And we are not persuaded by Plaintiffs that "the only logical and consistent" reading of the verdict forms requires a conclusion that the jury allocated the total actual damages among each Plaintiff's three state-law claims. Br. of Appellees at 71. We likewise reject Plaintiffs' argument that the verdict forms--forms, we note, that were proposed by Plaintiffs and adopted by the court--

confused the jury and caused it to improperly allocate the actual damages awards. "[M]ere speculation that a jury verdict may have been based on the jury's own misunderstanding of the law, even though properly instructed, is an insufficient basis on which to upset a jury verdict." *Gander v. FMC Corp.*, 892 F.2d 1373, 1379 (8th Cir.), cert. denied, 498 U.S. 878, 111 S. Ct. 209, 112 L. Ed. 2d 169 (1990). In sum, we conclude that the District Court did not err in rejecting Plaintiffs' calls to harmonize the jury's actual damages awards on Plaintiffs' state-law claims.

Patriot argues that the District Court erred by capping its punitive-damages award at $ 50,000. According to Patriot, the punitive-damages award is insufficient to make it whole as required by Connecticut law because Patriot's obligation under its contingency-fee arrangement with its attorneys--forty percent of Patriot's total recovery plus expenses--exceeds the sum of Patriot's share of the RICO-damages award plus the $ 50,000 punitive-damages award after imposition of the cap. Thus, Patriot argues, because it owes more in attorney fees than it will recover, the punitive damages permitted by the District Court are insufficient under Connecticut law. Viacom counters that the District Court properly set the punitive-damages cap because Connecticut law allows a court to award reasonable attorney fees no matter the terms of a contingency-fee agreement. See *Ham v. Greene*, 248 Conn. 508, 729 A.2d 740, 756 (Conn.) (affirming district court's punitive damages award even though amount was less than that calculated under contingency-fee agreement), cert. denied, 528 U.S. 929, 120 S. Ct. 326, 145 L. Ed. 2d 254 (1999); *Berry v. Loiseau*, 223 Conn. 786, 614 A.2d 414, 437 (Conn. 1992) (concluding that court was not bound

by contingency-fee agreement in calculating punitive damages under state statute).

We conclude that the District Court abused its discretion in setting the cap on Patriot's punitive-damages award at an amount that is insufficient to cover its litigation expenses as expressed in the contingency-fee agreement. In *Schoonmaker v. Laurence Brunoli, Inc.*, 265 Conn. 210, 828 A.2d 64, 104-05 (Conn. 2005), the Connecticut Supreme Court held that if a contingency fee "agreement is, by its terms, reasonable, the trial court may depart from its terms only when necessary to prevent 'substantial unfairness' to the party . . . who bears the ultimate responsibility for payment of the fee." On the other hand, if the trial court determines that the fee agreement is unreasonable on its face, the court "may exercise its discretion and award a reasonable fee in accordance with the factors enumerated in rule 1.5(a) of the Rules of Professional Conduct." *Id.* at 105. As we explain below, the RICO damages awarded by the jury to Patriot have been eliminated from the attorney-fees computation, and this result will likely affect the District Court's determination of the punitive-damages award. Accordingly, we reverse the judgment awarding Patriot $ 50,000 in punitive damages, and we remand to the District Court for reconsideration of this issue in light of our decision.

B. Massood Issues. Massood argues that the District Court erred in granting Viacom's motion to dismiss his RICO and state-law claims. We review de novo the District Court's order granting Viacom's motion to dismiss, affirming only if Massood can prove no set of

facts that would entitle him to relief. *Stahl v. U.S. Dep't of Agric.*, 327 F.3d 697, 700 (8th Cir. 2003).

Massood's claims were based on the following events: In the summer of 1997, Viacom approached Massood about acquiring his billboard corporation, Wilson-Curtis. Before the acquisition was finalized, Massood, on behalf of Wilson-Curtis, filed three billboard site applications with Viacom. According to Massood, Viacom fraudulently denied these applications, thereby diminishing the value of, and the price Viacom paid for, Wilson-Curtis. The acquisition was completed on January 21, 1999. Thereafter, Massood filed these RICO and state-law claims against Viacom "to recover the loss he suffered as a result of the lost value in the Wilson-Curtis shares he owned." First Amended Complaint at 14.

The District Court dismissed Massood's claims, noting that "a shareholder lacks standing to sue for injury to a corporation because the shareholder suffers only derivatively" through the decreased value of his investment. Order of July 21, 2004, at 2. A shareholder generally may not sue on his own behalf--under Missouri law or RICO--to recover the wrongful diminution in value of his stock or to recoup his share of money taken from the corporation; such claims must generally be pursued in a shareholders derivative action. See *Peterson v. Kennedy*, 791 S.W.2d 459, 464 (Mo. Ct. App. 1990) (observing that diminution in stock value must be addressed in a derivative shareholders suit; shareholders may not sue individually to "recover their proportionate share of money alleged to have been wrongfully taken from the corporation"); *Brennan v. Chestnut*, 973 F.2d 644, 648 (8th Cir. 1992) (noting

that a shareholder may not maintain a RICO action for injury to a corporation that resulted in the diminution in value of his shares without individual and direct injury to the shareholder); *Rand v. Anaconda-Ericsson, Inc.*, 794 F.2d 843, 849 (2d Cir.), cert. denied, 479 U.S. 987, 107 S. Ct. 579, 93 L. Ed. 2d 582 (1986) (same).

Massood argues that in the circumstances of this case, "[e]quity demands a different standing rule . . . [because] the fraudulent activity of the alleged wrongdoer (Viacom) enabled it to buy the tort victim corporation (Wilson-Curtis)" at a reduced price. Br. of Appellees at 89. In support of this contention, Massood cites several cases, but in none of those cases did the court permit the shareholder to recover individually for derivative claims. Rather, in those cases, the court permitted the shareholder, who continued to own shares in the surviving corporation, to pursue a derivative claim on behalf of the corporation that was acquired in the merger. See *Blasband v. Rales*, 971 F.2d 1034, 1046 (3d Cir. 1992) (applying Delaware law and holding that plaintiff who was a shareholder in surviving corporation could sue derivatively on behalf of its merged parent corporation); *Mendell ex rel. Viacom, Inc. v. Gollust*, 909 F.2d 724, 729 (2d Cir. 1990) (holding that in federal securities-law case, shareholder in surviving parent corporation had standing to pursue claims on behalf of merged subsidiary corporation); *Keyser v. Commonwealth Nat'l Fin. Corp.*, 120 F.R.D. 489, 493 (M.D. Pa. 1988) (allowing shareholders to maintain a derivative action on behalf of merged entity and separate individual actions) (superseded by statute); *Miller v. Steinbach*, 268 F. Supp. 255, 268-69 (S.D.N.Y. 1967) (holding that plaintiff who was a

shareholder in surviving corporation had "capacity to sue derivatively on behalf of" company that was merged into the surviving company).

We are not persuaded that in the circumstances of this case, equity demands that we permit Massood to assert his admittedly derivative claims for individual recovery. In several analogous situations, courts have refused to extend a derivative-standing exception to allow a shareholder (or former shareholder) to pursue *individually* claims that for some reason he could not have pursued derivatively. See, e.g., *Warren v. Mercantile Bank of St. Louis*, N.A., 11 S.W.3d 621, 623 (Mo. Ct. App. 1999) (holding that misrepresentation "claims based upon an agreement between two corporations and/or statements made to the officers or sole shareholders of a corporation belong to the corporation, not the individual officers or sole shareholders"; shareholder could not pursue individual claims for damages); *Rand*, 794 F.2d at 849 (concluding that shareholders who alleged that creditor violated RICO by forcing corporation's involuntary bankruptcy lacked standing to sue creditor because legal injury, if any, was to corporation/bankruptcy trustee and not to shareholders); *Lakonia Mgmt. Ltd. v. Meriwether*, 106 F. Supp. 2d 540, 550-52 (S.D.N.Y. 2000) (concluding that shareholder lacked standing to assert derivative RICO claim in individual capacity, even though he could not bring the claim derivatively because he no longer owned shares in the company); *Small v. Sussman*, 306 Ill. App. 3d 639, 713 N.E.2d 1216, 1221, 239 Ill. Dec. 366 (Ill. Ct. App. 1999) (reiterating that under Illinois law, if an alleged injury is to the corporation, any lawsuit must be brought on the corporation's behalf; fact that the

corporation had been sold and was part of another entity did not change the derivative requirement).

Thus, several courts have held that a shareholder lacks standing to pursue derivative claims individually even where, as in this case, the shareholder could not have pursued a derivative action because he no longer held stock in the allegedly injured company or he was otherwise barred from bringing a derivative suit. We cannot say that the District Court erred in reaching a similar conclusion in the circumstances of this case. We are not suggesting that we may never be presented with a case in which equity demands an exception to the derivative-standing rule, but this is not such a case.[11] The District Court did not err in granting Viacom's motion to dismiss Massood's RICO and state-law claims against Viacom for lack of standing.

C. RICO Issues--Viacom. We now turn to Plaintiffs' arguments that Viacom violated RICO. Plaintiffs alleged that Viacom formed three separate RICO association-in-fact enterprises with the BNSF, KCS, and B&M railroads "for the purpose of defrauding the plaintiffs and other small billboard businesses and their owners," in violation of RICO. Complaint at 33. Plaintiffs further asserted that while such associations in fact were "enterprises" as defined in RICO, each railroad was merely an innocent member of its respective enterprise.

The District Court granted Viacom's motion for summary judgment on these claims, concluding that "for an association of individuals to constitute an 'enterprise' for purposes of RICO, the individuals must share a common purpose to engage in a particular

fraudulent course of conduct and work together to achieve such purposes." Order of May 25, 2005, at 4 (emphasis added) (quoting *Blue Cross of Cal. v. SmithKline Beecham Clinical Labs., Inc.*, 62 F. Supp. 2d 544, 551 (D. Conn. 1998)). Recognizing that our Court has never directly held that the members of a RICO association-in-fact enterprise must share a common *fraudulent* purpose, the District Court was nevertheless persuaded by other courts that have so held. See, e.g., *First Capital Asset Mgmt., Inc. v. Satinwood, Inc.*, 385 F.3d 159, 174 (2d Cir. 2004) (noting that an association-in-fact enterprise "must share a common purpose to engage in a particular fraudulent course of conduct" (citation to quoted case omitted)), cf. *United States v. Cianci*, 378 F.3d 71, 83, 88 n.9 (1st Cir. 2004 (reasoning that the common purpose among members of an association-in-fact enterprise under RICO need not be fraudulent). We need not decide whether the common purpose under RICO must be fraudulent to affirm the District Court's dismissal of Plaintiffs' RICO claims against Viacom, however, because we conclude that Plaintiffs have failed to establish that the alleged association-in-fact enterprises shared a common purpose of any kind--fraudulent or otherwise.

We review a grant of summary judgment de novo, viewing the evidence in the light most favorable to the nonmoving party. *Larson v. Kempker*, 414 F.3d 936, 939 (8th Cir. 2005). Summary judgment is appropriate only if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Id. We may affirm on any ground supported by the record. *Hatchett v. Philander Smith Coll.*, 251 F.3d 670, 674 (8th Cir. 2001).

RICO makes it "unlawful for any person employed by or associated with any enterprise . . . to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. § 1962(c). RICO allows a private party who has been injured in his property to sue for damages, id. § 1964(c), recovering only if he can show: "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity," *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496, 105 S. Ct. 3275, 87 L. Ed. 2d 346 (1985) (footnote omitted). An "enterprise" is defined to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4).

"The existence of an enterprise at all times remains a separate element which must be proved by the" plaintiff in order to establish a RICO violation. *United States v. Turkette*, 452 U.S. 576, 583, 101 S. Ct. 2524, 69 L. Ed. 2d 246 (1981). Proving the existence of an enterprise requires "evidence of an ongoing organization, formal or informal, and . . . evidence that the various associates function as a continuing unit." Id. "[A]lthough much about the RICO statute is not clear, it is very clear that those who are 'associate[s],' 18 U.S.C. § 1962(e), of a criminal enterprise must share a 'common purpose.'" *Ryan v. Clemente*, 901 F.2d 177, 180 (1st Cir. 1990); see, e.g., *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 995 (8th Cir. 1989).

Plaintiffs argue that the common purpose shared by Viacom and each of the railroads was "leasing property owned by the railroad to outdoor billboard businesses." Second Amended Complaint at 34. We disagree with

this characterization. Viacom's purposes and the railroads' purposes were not sufficiently aligned under the facts of this case to prove the existence of a RICO enterprise. By Plaintiffs' own account, Viacom was operating strictly in its own best interests, appropriating billboard sites and delaying site applications when circumstances dictated that such action would benefit Viacom. Plaintiffs described several instances in which Viacom's conduct resulted in sites being "spaced out" by billboards erected on neighboring property, thus preventing the affected railroad from ever benefitting from a billboard located on its property. It is unlikely that the railroads would cooperate with Viacom to achieve this goal. Plaintiffs also described how Viacom hoped to discourage site applicants who intended to resell their billboards or licenses for what Viacom believed were undeserved profits. We cannot conceive how this goal was shared by any of the railroads, which presumably did not care who held the license for a particular billboard site as long as fees were paid. Plaintiffs also alleged that Viacom operated these RICO enterprises with a goal of eliminating competition in its billboard markets. Again, this goal would appear to be Viacom's alone, since competition for billboard sites on railroad property would presumably be in the railroads' best interests. In short, the Plaintiffs failed to allege sufficient facts to demonstrate Viacom and each of the three railroads had a "common purpose of engaging in a course of conduct." *Turkette*, 452 U.S. at 583. And "divergent goals" among members of a purported association-in-fact enterprise is a "fatal problem" to a RICO claim. See *Baker v. IBP, Inc.*, 357 F.3d 685, 691 (7th Cir.), cert. denied, 543 U.S. 956, 125 S. Ct. 412, 160 L. Ed. 2d 318 (2004). The

District Court did not err in granting Viacom's motion for summary judgment on Plaintiffs' RICO claims.

III. KELLY AND GUSTIN

We now address arguments raised by Kelly and Gustin regarding the RICO verdicts the jury returned against them. Kelly and Gustin argue that Plaintiffs failed to prove the essential elements of the RICO claims made against them individually and that the District Court therefore should not have allowed these claims to go to the jury. Instead, they argue, given the fatal deficiencies in these RICO claims, the District Court should have granted their separate motions for judgment as a matter of law. We review a district court's denial of a motion for judgment as a matter of law de novo, applying the same standards as the district court. *Nat'l Farmers Union Std. Ins. Co. v. Souris River Tel. Mut. Aid Coop.*, 75 F.3d 1268, 1273 (8th Cir. 1996). Judgment as a matter of law following a jury verdict is appropriate only when "the evidence is entirely insufficient to support the verdict." *Belk v. City of Eldon*, 228 F.3d 872, 878 (8th Cir. 2000), cert. denied, 532 U.S. 1008, 121 S. Ct. 1734, 149 L. Ed. 2d 659 (2001). In conducting our review, we consider the evidence in the light most favorable to the nonmoving party, here the Plaintiffs, giving that party the benefit of all favorable inferences that can reasonably be drawn from the evidence. See *Brown v. Fred's, Inc.*, 494 F.3d 736, 740 (8th Cir. 2007).

Like Plaintiffs' RICO claims against Viacom, Plaintiffs' RICO claims against Kelly and Gustin were predicated on violations of 18 U.S.C. § 1962(c), which requires proof of "(1) conduct (2) of an enterprise (3) through a

pattern (4) of racketeering activity." *Sedima*, 473 U.S. at 496 (footnote omitted). The requirements of § 1962(c) must be established as to each individual defendant. See, e.g., *id.* at 500 (noting that plaintiffs could maintain action if "the *defendants* conducted the enterprise through a pattern of racketeering activity") (emphasis added); *United States v. Persico*, 832 F.2d 705, 714 (2d Cir. 1987) ("The focus of section 1962(c) is on the individual patterns of racketeering engaged in by a defendant, rather than the collective activities of the members of the enterprise."), cert. denied, 486 U.S. 1022, 108 S. Ct. 1995, 108 S. Ct. 1996, 100 L. Ed. 2d 227 (1988). Failure to present sufficient evidence on any one element of a RICO claim means the entire claim fails. Cf. *Sedima*, 473 U.S. at 496. We focus on whether, assuming for the sake of argument that Kelly and Gustin engaged in the predicate acts of mail and wire fraud as alleged, Plaintiffs' evidence was sufficient to establish that those predicate acts can be said to form a pattern of racketeering activity.

Even if we assume that Plaintiffs' evidence was adequate to support the jury's conclusion that Kelly and Gustin committed the necessary predicate acts of mail fraud and wire fraud, we hold that the evidence was insufficient to support the jury's conclusion that Kelly and Gustin engaged in a pattern of racketeering activity as is also necessary for RICO liability. In *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 239, 109 S. Ct. 2893, 106 L. Ed. 2d 195 (1989), the Supreme Court observed that "to prove a pattern of racketeering activity a plaintiff . . . must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity.' Continuity in this context refers "either to a

closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *Id.* at 241. To satisfy the RICO continuity element, therefore, a plaintiff must provide evidence of multiple predicate acts occurring over a substantial period of time (closed-end continuity) or evidence that the alleged predicate acts threaten to extend into the future (open-ended continuity). *Id.* at 242. A plaintiff may establish open-ended continuity by showing that the predicate acts themselves involve a distinct threat of long-term racketeering activity or that the predicate acts constitute a regular way of conducting an ongoing legitimate business or a RICO enterprise. *Id.* at 242-43.

Here, the only theory advanced by Plaintiffs with respect to the continuity element was a theory of open-ended continuity. The jury was instructed, "Plaintiffs must prove that the acts of racketeering are related to each other and that they pose a threat of continued criminal activity." Instr. No. 21. Accordingly, Plaintiffs were required to show that the predicate acts of mail fraud and wire fraud committed by Kelly and Gustin "project[ed] into the future with a threat of repetition." *H.J. Inc.* 492 U.S. at 241. Plaintiffs' RICO theory is that Kelly and Gustin, individually, through the use of the mails and wires, devised and perpetrated a scheme by which Viacom would profess to follow a first-come, first-served procedure--thereby fraudulently inducing Plaintiffs to submit applications--but would secretly review railroad billboard site applications with the goal of appropriating desired sites for its own use. In other words, the culpable act was using the mails and wires to conceal or misrepresent the review process; it was not the review process itself. In January 2003, however, Viacom began routinely transmitting a standard form

letter to all site applicants notifying them that their applications were subject to review by Viacom. At that time, Viacom effectively terminated any allegedly fraudulent scheme Kelly and Gustin conducted by expressly notifying site applicants that Viacom would review all applications for billboard licenses and rule on each application in its discretion. Because there was no evidence that the review process would continue to be concealed or misrepresented by Kelly, Gustin, or any other Viacom employee in the future, Plaintiffs' theory of RICO continuity, and thus their RICO claims against Kelly and Gustin, must fail.

We have in the past rejected attempts to convert ordinary civil disputes into RICO cases. See, e.g., *Terry A. Lambert Plumbing, Inc. v. W. Sec. Bank*, 934 F.2d 976, 981 (8th Cir. 1991) (noting that RICO was not intended to apply to "ordinary commercial fraud" (citation to quoted case omitted)). Although Plaintiffs have presented evidence sufficient to establish violations of state law, they have not presented sufficient evidence to satisfy the more onerous requirements of RICO. Having carefully reviewed the record, we hold that Plaintiffs failed to produce sufficient evidence of RICO violations by Kelly and Gustin. The jury verdict on Plaintiffs' RICO claims against Kelly and Gustin therefore cannot stand, and Kelly and Gustin are each entitled to judgment as a matter of law.

Our reversal of the jury's verdict awarding damages to Plaintiffs on their RICO claims against Kelly and Gustin requires that we now address the District Court's order awarding Plaintiffs attorney fees under RICO's fee-shifting provision. 18 U.S.C. § 1964(c). In its

attorney-fees order, the District Court found that because Plaintiffs' "state theories [were] so closely intertwined with the RICO claims," attorney fees "on the entire matter [were] compensable under the federal statute." Order of July 18, 2006, at 2 (citing *Wal-Mart Stores, Inc. v. Barton*, 223 F.3d 770, 773-74 (8th Cir. 2000). Because Plaintiffs are no longer prevailing parties for purposes of RICO's fee-shifting provision, they are no longer entitled to recover the attorney fees related to their RICO claims, and we therefore reverse the District Court's order awarding attorney fees on Plaintiffs' RICO claims against Kelly and Gustin.

As for Plaintiffs' state-law claims, Missouri and Connecticut both follow the "American" rule for determining whether an award of attorney fees is appropriate. See *Randolph v. Mo. Hwys & Transp. Comm'n*, 224 S.W.3d 615, 619 (Mo. Ct. App. 2007); *Ames v. Comm'r of Motor Vehicles*, 267 Conn. 524, 839 A.2d 1250, 1255 (Conn. 2004). Under the American rule, each party is generally required to bear the expense of his own attorney fees. Attorney fees may be awarded if they are "provided for by statute, contract or 'when needed to balance benefits in a court of equity.'" *Randolph*, 224 S.W.3d at 619 (citations to quoted case omitted); see *Ames*, 839 A.2d at 1250. Because the District Court's award of attorney fees was based not only on Plaintiffs' RICO claims but also on their "closely intertwined" state-law claims, we are unable to determine in the first instance what amount of that award, if any, Plaintiffs are entitled to with respect to their state-law claims. Accordingly, we remand the attorney-fee issue to the District Court for reconsideration in light of this opinion.

In addition, Plaintiffs argue that the District Court abused its discretion by neglecting to rule on their request for attorney fees for work performed by the Wyrsch Hobbs law firm. We agree with Plaintiffs that the court's inadvertent failure to rule on this request was an abuse of discretion, and we direct the District Court on remand to give initial consideration to attorney fees for the Wyrsch Hobbs firm.

IV. CONCLUSION

In conclusion, we affirm the District Court's judgment on the jury's verdict in favor of Plaintiffs on their state-law claims against Viacom; affirm the District Court's judgment dismissing all of Massood's claims against Viacom; affirm the District Court's summary judgment for Viacom on Plaintiffs' RICO claims; and reverse the District Court's judgment on the jury's verdict in favor of Plaintiffs on their RICO claims against Kelly and Gustin. In addition, we reverse the District Court's judgment awarding punitive damages in the amount of $ 50,000 to Patriot and attorney fees and expenses in the amount of $ 1,863,840 to Plaintiffs on their RICO claims against Kelly and Gustin. We remand the case to the District Court for reconsideration of the punitive-damages and attorney-fees issues in light of this opinion. This case is also remanded for initial consideration of the request for attorney fees for the Wyrsch Hobbs law firm.

Footnotes

[1]The jury rejected Plaintiffs' RICO claims against defendants Randall Romig and Randy Jackson, and Plaintiffs do not appeal from that verdict.

[2]Missouri residents Craig Outdoor, Midwest Outdoor, and Massood asserted their state-law claims under Missouri law; Patriot Outdoor, a Connecticut resident, asserted its state-law claims under Connecticut law.

[3]"Spaced out" as used in the billboard industry means that a particular billboard site is no longer viable due to its proximity to a later-constructed billboard or other structure.

[4]Viacom correctly notes that when one of two theories of liability has been erroneously submitted to the jury, a general verdict--as was returned in this case--cannot stand. See Dudley v. Dittmer, 795 F.2d 669, 673 (8th Cir. 1986). Because we have concluded that both fraud theories were properly submitted to the jury, however, we need not address Viacom's arguments regarding the general verdict.

[5]This evidence was relevant and admissible not only to support Plaintiffs' allegations of fraud, see *Norden v. Friedman*, 756 S.W.2d 158, 164 (Mo. 1988); *Nazami v. Patrons Mut. Ins. Co.*, 280 Conn. 619, 910 A.2d 209, 214 (Conn. 2006), but also to show a pattern of racketeering activity, a necessary element of Plaintiffs' RICO claims.

[6]Viacom objected to Jury Instructions 14, 16, 21, 22, 23, 24, 25, 27, 28, 31, 33, 35, and 37 but not to Instruction 48--the District Court's instruction on damages.

[7]Viacom suggests that the jury instruction on tortious interference required that Plaintiffs prove "a reasonable probability of obtaining permission from Viacom "to build, sell, or lease billboards. Br. of Viacom at 48. This characterization of the jury instruction is

incorrect. The instructions required Plaintiffs to show that they had "a reasonable prospect of obtaining permission to build billboards on the sites [they] identified in [their] applications." Instrs. 35, 36. The jury instructions did not require proof of permission "from Viacom."

[8]Because we have affirmed the jury's verdict on Plaintiffs' fraud claims, we need not address Viacom's arguments that the failure of Plaintiffs' fraud claims requires reversal of the jury's verdict on Plaintiffs' tortious-interference claims.

[9]Viacom cites our decision in *Eden Electric, Ltd. v. Amana Co.*, 370 F.3d 824, 828-29 (8th Cir. 2004), cert. denied, 543 U.S. 1150, 125 S. Ct. 1322, 161 L. Ed. 2d 112 (2005), for its proposition that in a commercial case alleging particularly egregious behavior, a punitive-damages multiplier of roughly 4:1 is the constitutional maximum. We disagree with Viacom's contention that its behavior in this case was not particularly egregious, and we reject Viacom's argument that a 4:1 multiplier is the constitutional maximum in every commercial case. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425, 123 S. Ct. 1513, 155 L. Ed. 2d 585 (2003).

[10]Because we reverse the jury's verdict on Plaintiffs' RICO claims against Gustin and Kelly, we need not address Plaintiffs' arguments regarding the calculation of the RICO damages awarded pursuant to those verdicts.

[11]We note that Massood apparently knew about Viacom's alleged appropriation of the three Wilson-Curtis billboard sites roughly six months before he sold

his Wilson-Curtis shares to Viacom. Thus, it appears that Massood could have brought a derivative action on behalf of Wilson-Curtis prior to the sale of his shares. See *Lakonia Mgmt.*, 106 F. Supp. 2d at 551 n.20 (stating "no unfairness" in dismissing suit for lack of standing when former shareholder had knowledge of allegedly objectionable conduct before sale of shares and had opportunity to bring derivative action but did not).

5/25/2005
Case No. 04-0074-CV-W-DW
IN THE UNITED STATES DISTRICTCOURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

CRAIG OUTDOOR ADVERTISING, INC., CURTIS MASSOOD, and MIDWEST OUTDOOR MEDIA, LLC, and PATRIOT LLC
Plaintiffs,

v.

VIACOM OUTDOOR, INC. f/k/a Infinity Outdoor, Inc., WALLY KELLY, RANDALL F. ROMIG, RANDY JACKSON, and HAROLD GUSTIN,
Defendants.

ORDER

Pending before the Court is the Defendants' motion for summary judgment (Doc. 124). The Plaintiffs filed suggestions in opposition (Doc. 141),[1] and the Defendants filed a reply brief (Doc. 147). After reviewing the record and the parties' arguments, the Court GRANTS IN PART and DENIES IN PART the Defendants' motion for summary judgment.

I.[2]

As an initial matter, the Plaintiffs repeatedly argue that under the "law of the case" doctrine, the pending motion for summary judgment must be denied because the Court previously rejected the Defendants' motion to dismiss. See Plts.' Amend. Suggs. in Opp. at 1

(stating that the Defendants' "arguments should not be reconsidered here as the 'law of the case' doctrine instructs"). That argument is wrong as a matter of law. The Eighth Circuit has repeatedly recognized that "the doctrine of the law of the case is applicable only to final judgments, not to interlocutory orders." Muff Plumbing Inc. v. Scherer Fin. Servs. Co., 48 F.3d 1066, 1070 (8th Cir. 1995). This Court "has the inherent power to reconsider and modify an interlocutory order any time prior to the entry of judgment," including an "order denying a motion to dismiss a complaint." Id. The Court now proceeds to the Defendants' motion for summary judgment.

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56. Under Fed. R. Civ. P. 56(c), the moving party bears the initial burden of "informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue for trial." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the moving party fails to meet this initial burden, the court must deny the motion, regardless of the non-moving party's response. See id.

When the moving party does meet its initial burden, the nonmovant cannot survive a motion for summary judgment by resting on the mere allegations of its pleadings. Fed. R. Civ. P. 56(e); Lower Brule Sioux Tribe v. State of S.D., 104 F.3d 1017, 1021 (8th Cir. 1997). Instead, the nonmovant must set forth specific facts by affidavit or other evidence showing that a genuine issue of material fact exists. See id. Summary

judgment is not a disfavored procedural shortcut. To the contrary, it is an integral part of the Federal Rules as a whole, which are designed to secure the just, speedy and inexpensive determination of every action. Celotex, 477 U.S. at 327.

II.

A.

Counts I and N of the Plaintiffs' Second Amended Complaint (Doc. 60) alleges that "defendant Outdoor[3] formed an association-in-fact with Outdoor's client railroad[s] ... for the purpose of defrauding the [P]laintiffs and other small billboard businesses and their owners." Second Amend. Compl., Pars. 162-64, 206-208. These client railroads are the Burlington Northern/Santa Fe Railroad ("Burlington"), the Kansas City Southern Railway ("Kansas City Southern"), and the Boston & Maine Railroad ("Boston & Maine"). This association-in-fact, according to the Plaintiffs, is an "enterprise" as defined by the Racketeer Influenced and Corrupt Organizations Act ("RICO"). 18 U.S.C. § 1961(4).[4] The complaint provides that although each railroad comprised part of the association-in-fact, "it was a victim of the [D]efendant conspirators, not a conspirator itself." In other words, Burlington, Kansas City Southern and Boston & Maine were innocent members of the alleged "enterprise."

Count I alleges that the Defendants violated 18 U.S.C. § 1962(c)[5] and Count IV alleges that the Defendants violated 18 U.S.C. § 1962(d).[6] If a plaintiff establishes a violation under § 1962(c), he may establish a conspiracy to violate RICO "simply by presenting additional evidence that the defendant entered into an agreement

to breach the statute." Handeen v. Lemaire, 112 F.3d 1339, 1354 (8th Cir. 1997).

A RICO enterprise is generally established by showing three factors: (1) that the associated persons formed an ongoing organization; (2) they functioned as an ongoing unit; and (3) the organization was separate from the pattern of racketeering activity in which it engaged. See Atlas Pile Driving Co. v. DiCon Fin. Co., 886 F.2d 986, 995 (8th Cir. 1989). Although the Eighth Circuit has not directly addressed the issue, numerous courts have held that innocent participants cannot comprise an "association-in-fact" enterprise. See, e.g., 800537 Ontario Inc. v. Auto Enter., Inc., 113 F. Supp.2d 1116, 1123 (E.D. Mich. 2000); Blue Cross of Cal. v. SmithKline Beecham Clinical Labs., Inc., 62 F. Supp.2d 544, 551 (D. Conn. 1998). These courts reason that "for an association of individuals to constitute an 'enterprise' for purposes of RICO, the individuals must share a common purpose to engage in a particular fraudulent course of conduct and work together to achieve such purposes." Blue Cross, 62 F. Supp.2d at 551.

The Court agrees, and holds that an association-in-fact enterprise cannot consist of innocent participants. In re Pharm. Indus. Average Wholesale Price Litig., 307 F. Supp.2d 196, 204-OS (D. Mass. 2004). As a result, Counts I and IV of the Plaintiffs' Second Amended Complaint fail as a matter of law. Neither Count indicates that Burlington, Kansas City Southern, or Boston & Maine shared a common purpose to engage in a particular fraudulent or conspiratorial course of conduct or worked together to achieve such goals. Blue Cross, 62 F. Supp.2d at 551. To the contrary, the Plaintiffs' Complaint states that these railroads were

"victims" of the defendant conspirators. For these reasons, the Defendants' motion for summary judgment on Counts I and IV is GRANTED.

B.

Count III of the Plaintiffs' Second Amended Complaint alleges that the Defendants violated 18 U.S.C. § 1962(a). That section makes it unlawful for any person to use or invest any part of income derived from a pattern of racketeering activity in the operation of any enterprise engaged in interstate commerce. Id. As the Eighth Circuit has explained, "RICO gives only individuals who have suffered injury from the use or investment of racketeering income standing to bring a civil suit under [§ 1962(a)] . . . ." Fogie v. Thorn Americas, Inc., 190 F.3d 889, 895 (8th Cir. 1999). Additionally, "to bring a claim under § 1962(a), a plaintiff must allege an injury from the use or investment of the racketeering income that is separate and distinct from injuries allegedly caused by the defendant's engaging in the predicate acts." Id. at 896; see also Vemco, Inc. v. Camardella, 23 F.3d 129, 132 (8th Cir. 1994). Stated differently, a claim brought under 18 U.S.C. § 1962(a) must be dismissed if a plaintiff alleges "only injuries traceable to the alleged predicate acts." Craighead v. E.F. Hutton & Co., Inc., 899 F.2d 485, 494 (6th Cir. 1990).

Here, the gravamen of the Complaint is that the Defendants allegedly duped the Plaintiffs into revealing desirable billboard sites to them, and the Defendants then stole those sites for their own benefit. The Plaintiffs contend that § 1962(a) is satisfied because the Defendants reinvested the money earned from stealing

those billboard sites into Outdoor which strengthened Outdoor's position in the billboard market, making it more difficult for the Plaintiffs to compete with Outdoor, and causing the Plaintiffs to lose "lucrative billboard locations." The Court disagrees, and finds that the Plaintiffs' argument is pure speculation. As the Defendants correctly note, "Plaintiffs have failed to point to a single piece of evidence showing that they have sustained 'investment' injuries under § 1962(a) that are ***distinct*** from the injuries they allegedly suffered from the various predicate acts they allege." See Doc.147, at 23-24 (emphasis in original).

For these reasons, the Defendants' motion for summary judgment on Count III is GRANTED.

C.

Count V of the Plaintiffs' Second Amended Complaint seeks preliminary and permanent injunctive relief "prohibiting continuation of corrupt scheme and racketeering activity." To support this Count, the Plaintiffs rely solely on RICO. Several courts have held, however, that injunctive relief is not available to civil RICO plaintiffs. In re Fredeman Litig., 843 F.2d 821, 828-29 (5th Cir. 1988); Religious Tech. Ctr. v. Wollersheim, 796 F.2d 1076,1080-89 (9th Cir. 1986); First Nat'l Bank & Trust Co. v. Hollingsworth, 701 F. Supp. 701(W.D. Ark. 1988).[7]

As the Hollingsworth court stated:

> The clear message from the legislative history is that, in considering civil RICO, Congress was repeatedly presented with the opportunity *expressly* to include a provision permitting

> private plaintiffs to secure injunctive relief. On each occasion, Congress *rejected* the addition of any such provision.

Hollingsworth, 701 F. Supp. at 703 (emphasis in original) (internal citations and quotations omitted). This Court agrees, and holds that injunctive relief is not available to private RICO plaintiffs. Accordingly, the Defendants' motion for summary judgment on Count V is GRANTED.

D.

After reviewing the record, and at this time, it is sufficient for the Court to hold that a material issue of fact exists with Count II (RICO violation under 18 U.S.C. § 1962(c)), Count VI (claim for fraudulent misrepresentations), Count VII (claim for tortious interference with a business expectancy), and Count VIII (claim for unfair competition). Therefore, the Defendants' motion for summary judgment with respect to those Counts are DENIED. Of course, the Defendants may raise these issues at a later date, including a motion for judgment as a matter of law.

In anticipation of trial, three additional points should be mentioned. First, the Plaintiffs incorrectly contend that if the individual Defendants did not directly participate in at least two predicate acts, they can be held liable for "aiding and abetting" predicate offenses. They argue that "RICO recognizes civil liability for those who merely aid and abet the underlying predicate offenses." Amend. Suggs. in Opp., at 35. That assertion is legally erroneous.

In Central Bank of Denver v. First Interstate Bank of Denver, 511 U.S. 164 (1994), the United States Supreme Court held that there is no private right of action for aiding and abetting securities fraud under § 10(b) of the Securities Exchange Act. Extending the Central Bank ruling, the Third Circuit Court of Appeals recently ruled that "because RICO's statutory text does not provide for a private cause of action for aiding and abetting and 18 U.S.C. § 2 cannot be used to imply this private right, no such cause of action exists under RICO." Pennsylvania Assn of Edwards Heirs v. Rightenour, 235 F.3d 839, 840 (3rd Cir. 2000). The Court agrees with the reasoning of Rightenour.

Therefore, although the Plaintiffs may assert at trial that the individual defendants directly participated in predicate acts, Plaintiffs may not rely on an "aiding and abetting" theory to establish liability. Nor will the Court instruct the jury on an aiding and abetting theory.

Second, the Defendants argue that "civil RICO plaintiffs cannot recover for a RICO claim based on alleged predicate acts of mail and wire fraud" without also establishing "detrimental reliance and damage." See Doc. 147, at 6. The Plaintiffs apparently refute that argument, but their position is somewhat unclear. Amend. Suggs. in Opp. at 11-16.

As this Court, and numerous others have recognized, when a "[p]laintiff bases a RICO claim on predicate acts of mail fraud and wire fraud, detrimental reliance on the alleged fraudulent acts must be established." Arno Park, Inc. v. Yogurt Ventures U.S.A., Inc., 1994 WL 740895, at * 3 (W.D. Mo. Dec. 9,1994); see also

Appletree Square I. Ltd. P'ship v. W.R. Grace & Co., 29 F.3d 1283, 1286 (8th Cir. 1994); Nolan v. Galaxy Scientific Corp., 269 F. Supp.2d 635, 641 (E.D. Pa. 2003) (recognizing that "a number of other circuits have similarly concluded that reliance must be shown before mail fraud will serve as a RICO predicate act") (internal citations omitted); Williams v. Dow Chem. Co., 255 F. Supp.2d 219, 227 (S.D.N.Y. 2003) (stating that a "plaintiff alleging predicate acts sounding in fraud-such as those instances of mail fraud and wire fraud ... must prove justifiable detrimental reliance to establish causation").

Therefore, at trial, if the Plaintiffs contend that the Defendants committed predicate acts of mail and wire fraud, they must establish (1) a plan or scheme to defraud; (2) intent to defraud; (3) reasonable foreseeability that the mails or wires would be used to further the scheme; and (4) actual use of the mails or wires to further the scheme. United States v. Frank, 354 F.3d 910, 91718 (8th Cir. 2004). In addition, the Plaintiffs must also establish detrimental reliance and damages. Arno Park, Inc., 1994 WL 740895, at * 3. Both parties should keep these requirements in mind when drafting their proposed jury instructions.

Third, according to the Court's Scheduling Order, motions in limine must be filed 30 days before the date of trial,' and responses shall be filed 7 days later. Considering the track record of this litigation, the Court anticipates a deluge of motions in limine. Rather than rule on these motions by written orders, a hearing shall be held on Thursday, June 23, 2005, commencing at 9:00 a.m., in Courtroom #8B of the United States Courthouse at 400 E. 9th Street in Kansas City,

Missouri. Although the parties may still file their motions in limine 30 days before the date of trial, the Court intends to resolve all pre-trial evidentiary matters at the hearing.

III.

For the reasons stated above, it is hereby

ORDERED that the Defendants' motion for summary judgment with respect to Counts I, III, IV, and V of the Plaintiffs' Second Amended Complaint is GRANTED, and those Counts are DISMISSED WITH PREJUDICE, it is further

ORDERED that the Defendants' motion for summary judgment with respect to Counts II, VI, VII, and VIII are DENIED; it is further

ORDERED that a hearing on the parties' motions in limine shall be held on Thursday, June 23, 2005, commencing at 9:00 a.m., in Courtroom #8B of the United States Courthouse at 400 E. 9th Street in Kansas City, Missouri.

SO ORDERED.

Footnotes

[1]Technically, the Plaintiffs' amended suggestions in opposition are attached as an exhibit to Document 142, which is their motion for leave to file amended suggestions in opposition.

[2]The facts of this case are found within the parties'

numerous (and voluminous) filings with the Court. This Order only discusses those facts relevant to the Court's rulings herein. Of course, all facts must be construed in a light most favorable to the non-moving party. Carter v. Chrysler Corp., 173 F.3d 693, 696 (8th Cir. 1999).

[3]Of course, Viacom Outdoor, Inc. was formerly known as Infinity Outdoor, Inc. For the purpose of consistency, this Order will use "Outdoor" to describe both entities.

[4]The term "enterprise" is defined as including "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4).

[5]In its entirety, 18 U.S.C. § 1962(c) provides that

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

[6]18 U.S.C. § 1962(4) provides that "[i]t shall be unlawful for any person to conspire to violate [18 U.S.C. § 1962 (a), (b), or (c)]."

[7]It does not appear that the Eighth Circuit has squarely addressed this issue.

7/21/2004

Case No. 04-0074-CV-W-DW
IN THE UNITED STATES DISTRICTCOURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

CRAIG OUTDOOR ADVERTISING, INC., CURTIS MASSOOD, and MIDWEST OUTDOOR MEDIA, LLC, and PATRIOT LLC
Plaintiffs,

v.

VIACOM OUTDOOR, INC. f/k/a Infinity Outdoor, Inc., WALLY KELLY, RANDALL F. ROMIG, RANDY JACKSON, and HAROLD GUSTIN,
Defendants.

ORDER

Pending before the Court is the Defendants' motion to dismiss the Plaintiffs' First Amended Complaint (Doc. 17). The Plaintiffs filed suggestions in opposition (Doc. 22) and the Defendants filed a reply (Doc. 28). After reviewing the record and the parties' arguments, the Court GRANTS IN PART and DENIES IN PART the Defendants' motion to dismiss.

I.

The Defendants' motion to dismiss argues that the Complaint should be dismissed for three primary reasons: (1) the Plaintiffs fail to state a RICO claim upon which relief may be granted; (2) Plaintiff Curtis

Massood's ("Massood") claims are barred by res judicata;[1] and (3) Massood lacks standing to assert any claim against the Defendants. Both parties have submitted well-reasoned briefs to support their respective positions on these issues.[2] After a careful review of the record, the Court finds Massood lacks standing to pursue his claims. The Court also finds that the remaining Plaintiffs have pled facts sufficient to allow their suit to survive the pending motion to dismiss.

II.

When considering any motion to dismiss a district court is "constrained by a stringent standard." See Parnes v. Gateway 2000, Inc., 122 F.3d 539, 545-46 (8th Cir. 1997). "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id.; Osborn v. United States, 918 F.2d 724, 728-30 (8th Cir. 1990). Additionally, factual allegations in the complaint must be construed in the light most favorable to the plaintiff. Kushner v. Beverly Enters., Inc., 317 F.3d 820, 824 (8th Cir. 2003) (citations omitted).

III.

In this case, Massood "seeks to recover the *loss he suffered as a result of the lost value in the Wilson-Curtis shares* he owned caused by Outdoor's scheme to reduce the value of Wilson-Curtis." See First Amend. Compl., Par. 14 (emphasis added). To recoup these losses, Massood alleges causes of action against the Defendants for RICO violations, tortious interference,

fraud and unfair competition. In turn, the Court will analyze whether Massood has standing to bring these claims.

As a preliminary matter, it is axiomatic that a shareholder lacks standing to sue for injury to a corporation because the shareholder suffers only derivatively, i.e., "the decrease in the value of his investment." Dayton Monetary Assoc. v. Donaldson, Lufkin & Jenrette Sec. Corp., 1993 WL 410503 * 1 (S.D.N.Y. Oct. 14, 1993); see also Peterson v. Kennedy, 791 S.W.2d 459, 464 (Mo. Ct. App. 1990) (recognizing that if a cause of action is based on the "diminished value of plaintiffs' shares ... plaintiffs' action is a derivative shareholders' suit"). Consequently, "[f]ederal courts have held repeatedly that `shareholders of a corporation lack standing as individuals to bring a RICO action for diminution in the value of their stock allegedly caused by racketeering activities conducted against the corporation.'" Miller v. Loucks, 1992 WL 329313, 12 n. 5 (N.D. Ill. Nov. 5, 1992) (internal citations omitted). Consequently, because the Defendants' alleged racketeering activities diminished the value of his Wilson-Curtis stock, Massood lacks standing to pursue his RICO claims (Counts I-VI).

Next, under Missouri law, the "[c]orporation, rather than its shareholders, [is] the party aggrieved by intentional interference with the corporation's business expectancies." 45 Am. Jur. 2d Interference § 45 (citing 21 West, Inc. v. Meadowgreen Trails, Inc., 913 S.W.2d 858 (Mo. Ct. App. 1995)). Massood therefore lacks standing to bring his tortious interference claim (Count VIII).

Finally, the Court agrees with the Defendants in that "Massood bases his fraud and unfair competition claims ... on [D]efendants' alleged misrepresentations to Massood concerning the billboard sites he identified to Viacom Outdoor." See Doc. 17, Defs.' Suggs. in Supp., at 24. Under Missouri law, "misrepresentation claims based upon ... statements made to the officers or sole shareholders of a corporation belong to the corporation, not the individual officers or sole shareholders." Warren v. Mercantile Bank of St. Louis, 11 S.W.3d 621, 622-23 (Mo. Ct. App. 1999); see also Sequa Corp. v. Cooper, 128 S.W.3d 69, 75 (Mo. Ct. App. 2004). Accordingly, the Court finds that any fraud (Count VII) and unfair competition (Count IX) claims belong to Wilson-Curtis, and not to Massood individually. As a result, Massood lacks standing to bring his fraud and unfair competition claims.

VI.

For all the foregoing reasons, the Court finds that Massood lacks standing to pursue all Counts alleged in the Complaint. The Court also finds that under applicable law, the other Plaintiffs have pled facts sufficient to allow their suit to survive the pending motion to dismiss. Accordingly, it is hereby

ORDERED that Massood has failed to state any claim upon which relief may be granted and therefore the Defendants' motion to dismiss with respect to Massood is GRANTED; it is further

ORDERED that the Defendants' motion to dismiss the other Defendants and Counts of the Plaintiffs' First Amended Complaint is DENIED.

SO ORDERED.

Footnotes

[1] On September 24, 2002, the Missouri Court of Appeals held that Massood lacked standing to pursue claims similar to those in the case at bar. Massood v. Infinity Outdoor, Inc., No. WD60956 (Mo. Ct. App. 2002). Because the Court finds that Massood also lacks standing in this case, it need not address the Defendants' res judicata argument.

[2] Despite a myriad of factual and legal issues involved, the Court attempts to draft this Order as brief and concise as possible.

7/18/2006

Case No. 04-0074-CV-W-DW

IN THE UNITED STATES DISTRICTCOURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

CRAIG OUTDOOR ADVERTISING, INC., CURTIS MASSOOD, and MIDWEST OUTDOOR MEDIA, LLC, and PATRIOT LLC
Plaintiffs,

v.

VIACOM OUTDOOR, INC. f/k/a Infinity Outdoor, Inc., WALLY KELLY, RANDALL F. ROMIG, RANDY JACKSON, and HAROLD GUSTIN,
Defendants.

JUDGMENT IN A CIVIL CASE

X Decision by Court. This action has come before the Court as a briefed matter and a decision has been rendered.

ORDERED (December 14, 2005) - For Plaintiff Craig: Against Defendant Viacom, $125,000 for actual damages on a single state law claim, and $1,044,445 in punitive damages on that single state law claim. In addition, against Defendants Kelly and Gustin, $325,000 damages under RICO, trebled by statute to $975,000. Thus, the judgment for Craig totals $2,144,445.

For Plaintiff Midwest: Against Defendant Viacom, $125,000 for actual damages on a single state law claim, and $1,044,445 in punitive damages on that single state

law claim. In addition, against Defendants Kelly and Gustin, $325,000 damages under RICO, trebled by statute to $975,000. Thus, the judgment for Midwest totals $2,144,445.

For Plaintiff Patriot: Against Defendant Viacom, $80,000 for actual damages on a single state law claim, and provisionally, $1,044,445 in punitive damages on that single state law claim (subject to remittitur - on the Court's motion - consistent with the Connecticut punitive damages cap and federal due process). In addition, against Defendants Kelly and Gustin, $240,000 damages under RICO, trebled by statute to $720,000. Thus, the judgment for Patriot totals $1,844,445 (subject to remittitur-on the Court's motion-consistent with the Connecticut punitive damages cap and federal due process).

ORDERED (July 18, 2006) THAT: Plaintiffs shall recover from Defendants Kelly and Gustin a RICO fee award of $1,863,840.00, which includes $1,809,500.00 in reasonable attorney fees and $54,340.00 in reasonable out-of-pocket expenses; and ORDERS that a final punitive damages judgment of $50,000.00 on a single state law claim be entered for Plaintiff Patriot against Defendant Viacom; and ORDERS that Defendant Viacom is sanctioned under Rule 37 with a fine of $10,000.00.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 06-3335
Craig Outdoor Advertising, Inc.; Curtis Massood; Midwest Outdoor Media, LLC; Patriot Outdoor, LLC,
Plaintiffs-Appellees,

v.

Viacom Outdoor, Inc.;
Defendant,

Wally Kelly;
Defendant-Appellant,

Randall F. Romig; Randy Jackson; Harold Gustin; CPA Carlton Beckstrom,
Defendants.

No. 06-3337
Craig Outdoor Advertising, Inc.; Curtis Massood; Midwest Outdoor Media, LLC; Patriot Outdoor, LLC,
Plaintiffs-Appellees,

v.

Viacom Outdoor, Inc.,
Defendant-Appellant,

Wally Kelly; Randall F. Romig; Randy Jackson; Harold Gustin; CPA Carlton Beckstrom,
Defendants.

No. 06-3339

Craig Outdoor Advertising, Inc.; Curtis Massood; Midwest Outdoor Media, LLC; Patriot Outdoor, LLC,
Plaintiffs-Appellees,

v.

Viacom Outdoor, Inc.; Wally Kelly; Randall F. Romig; Randy Jackson, Defendants,

Harold Gustin, Defendant-Appellant, CPA Carlton Beckstrom,
Defendant.

No. 06-3341
Craig Outdoor Advertising, Inc.; Curtis Massood; Midwest Outdoor Media, LLC; Patriot Outdoor, LLC,
Plaintiffs-Appellants,

v.

Viacom Outdoor, Inc.; Wally Kelly,
Defendants-Appellees,

Randall F. Romig; Randy Jackson,
Defendants,

Harold Gustin,
Defendant-Appellee,

CPA Carlton Beckstrom,
Defendant.

Appeals from the United States District Court for the Western District of Missouri.

ORDER

The petition for rehearing en banc filed by Appellees/Cross-Appellants Craig Outdoor Advertising, Inc., Curtis Massood, Midwest Outdoor Media, LLC, and Patriot Outdoor, LLC is denied. The petition for rehearing by the panel is also denied.

VIACOM
OUTDOOR

January 13, 2003

Mr. Frank J. Vargish, III, Esq.
TUCKER OUTDOOR
1800 Millport Road
Lancaster, PA 17602

Re: Applications # RR 7074(E) – PRR 7077(E)

Dear Mr. Holmes:

We are in receipt of your request to erect four sign structures on land Viacom Outdoor Group Inc. licenses or leases from Pennsylvania Lines LLC, as follows:

> 4 Sites – Along the S/S US 30; W/O Rt 100 Phoenixville Pike; Exton, PA.

Your request will be reviewed and processed and you will be notified whether or not it is approved for further processing in the ordinary course. If approved, we require a $500 per application processing fee in order to obtain required site and engineering approval from the railroad along with subsequent licensing. Upon said approval you will be sent a standard from license setting forth the terms upon which Viacom Outdoor is willing to allow erection and operation of your proposed sign structure.

Please be informed that until such time as you receive written confirmation of the approval of your application and a license agreement is fully executed, you are not

authorized to survey the subject property, apply for any permits or take any other action which impacts the subject land, including but not limited to applying for zoning approval or variance, without the express and specific written consent of Viacom Outdoor, which may be given or denied at the sole discretion of Viacom Outdoor. The granting of any such consent shall not be deemed nor relied upon to be final approval of your application. Any such action undertaken prior to final approval of your application and full execution of a license shall be taken at your sole risk and expense without any reimbursement from Viacom Outdoor or Pennsylvania Lines LLC.

Very truly yours,

Harold Gustin
Senior Vice President
Landlease

Cc: Don Avjean
Tom Rende

Supreme Court, U.S.
FILED
DEC 12 2008
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No. 08-478

IN THE

Supreme Court of the United States

CRAIG OUTDOOR ADVERTISING, INC., CURTIS MASSOOD, MIDWEST OUTDOOR MEDIA, LLC, AND PATRIOT OUTDOOR, LLC,

Petitioners,

v.

VIACOM OUTDOOR INC., WALLY KELLY, AND HAROLD GUSTIN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

RESPONDENT VIACOM OUTDOOR INC.'S BRIEF IN OPPOSITION

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December 12, 2008

QUESTIONS PRESENTED

1. Whether the Eighth Circuit correctly applied the settled common-purpose requirement of a RICO enterprise in holding that parties to an agreement do not share a common purpose where one party uses the agreement to advance its own interests at the expense of the other party's interests.

2. Whether the Eighth Circuit correctly applied the settled "continuity" requirement of a "pattern of racketeering activity" under RICO in holding that there was no "open-ended" continuity where disclosures by the defendants terminated the alleged fraud-by-omission.

3. Whether, in dismissing claims by a former shareholder based on injuries to the corporation, the Eighth Circuit correctly applied the settled rule that shareholders lack standing to recover individually for corporate damages.

CORPORATE DISCLOSURE STATEMENT

1. Respondent Viacom Outdoor Inc. has changed its name to CBS Outdoor Inc. as a result of the corporate reorganization of its parent company.

2. CBS Radio Media Corporation f/k/a Infinity Media Corporation owns 100% of the stock of CBS Outdoor Inc. f/k/a Viacom Outdoor Inc.

3. CBS Radio Inc. f/k/a Infinity Broadcasting Corporation owns 100% of the stock of CBS Radio Media Corporation f/k/a Infinity Media Corporation.

4. CBS Broadcasting Inc. owns 100% of the stock of CBS Radio Inc. f/k/a Infinity Broadcasting Corporation.

5. Westinghouse CBS Holding Company, Inc. owns 100% of the stock of CBS Broadcasting Inc.

6. CBS Corporation, a publicly-traded company, owns 100% of the stock of Westinghouse CBS Holding Company, Inc.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

CORPORATE DISCLOSURE STATEMENT ii

TABLE OF AUTHORITIES vi

RESPONDENT VIACOM OUTDOOR INC.'S BRIEF IN OPPOSITION 1

INTRODUCTION 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 8

I. THE EIGHTH CIRCUIT'S REJECTION OF THE RICO CLAIMS AGAINST VIACOM IS NOT WORTHY OF REVIEW 9

A. The Eighth Circuit Correctly Held That Petitioners Failed To Establish the "Common Purpose" Requirement of Their RICO Claims 9

B. Petitioners' Arguments for Review of This Issue Are Meritless 14

1. Petitioners Mischaracterize the Eighth Circuit's Holding 14

2. The Common Purpose Identified by Petitioners Is Not Supported by the Record and Was Properly Rejected by the Eighth Circuit 16

3. Petitioners Identify No Legitimate Split in Judicial Authority 17

TABLE OF CONTENTS
(continued)

Page

a. The Eighth Circuit's Decision Does Not Conflict with *Mohawk* ... 17

b. The Eighth Circuit's Decision Also Does Not Conflict with *Orena* ... 20

C. This Case Is a Poor Vehicle for Reviewing the Common Purpose Issue ... 20

II. THE EIGHTH CIRCUIT'S REJECTION OF RICO CLAIMS AGAINST KELLY AND GUSTIN IS ALSO NOT WORTHY OF REVIEW ... 22

A. The Eighth Circuit Correctly Applied Settled Law in Concluding that Petitioners Presented Insufficient Evidence of a RICO Pattern ... 22

B. Petitioners' Arguments for Review Are Meritless ... 25

III. THE EIGHTH CIRCUIT'S HOLDING THAT PETITIONER MASSOOD LACKS STANDING IS NOT WORTHY OF REVIEW ... 28

A. The Eighth Circuit Correctly Applied Settled Principles of Shareholder Standing to the Facts of This Case ... 28

B. Petitioner Massood's Arguments for Review Are Meritless ... 29

1. Massood's Standing Theory Is Novel and Unsupported ... 29

TABLE OF CONTENTS
(continued)

Page

2. Massood's Standing on His Non-RICO Claims Does Not Present a Federal Issue 31

3. Case Law Does Not Support Massood's Standing on His RICO Claims 32

CONCLUSION 34

TABLE OF AUTHORITIES

Page

CASES

Anza v. Ideal Steel Supply Corp., 547 U.S. 451 (2006) 17

Atlas Pile Driving Co. v. DiCon Financial Co., 886 F.2d 986 (8th Cir. 1989) 21

Baker v. IBP, Inc., 357 F.3d 685 (7th Cir. 2004) 19

Blasband v. Rales, 971 F.2d 1034 (3d Cir. 1992) 32

Blue Cross of California v. SmithKline Beecham Clinical Laboratories, Inc., 62 F. Supp. 2d 544 (D. Conn. 1998) 12

Boyle v. United States, 129 S. Ct. 29 (2008) 14

Brennan v. Chestnut, 973 F.2d 644 (8th Cir. 1992) 32

Bridge v. Phoenix Bond & Indemnity Co., 128 S. Ct. 2131 (2008) 27

Commercial Cleaning Services, L.L.C. v. Colin Service Systems, Inc., 271 F.3d 374 (2d Cir. 2001) 19

TABLE OF AUTHORITIES
(continued)

Page

First Nationwide Bank, FSB v. Gelt Funding, Corp., 820 F. Supp. 89 (S.D.N.Y. 1993)..... 12

Gonzalez v. Crosby, 545 U.S. 524 (2005)..... 8

Heart of America Grain Inspection Service, Inc. v. Missouri Department of Agriculture, 123 F.3d 1098 (8th Cir. 1997)..... 33

H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989)..... 23

Lakonia Management Ltd. v. Meriwether, 106 F. Supp. 2d 540 (S.D.N.Y. 2000) 29, 32

In re Lupron Marketing & Sales Practices Litigation, 295 F. Supp. 2d 148 (D. Mass. 2003) 12

Maiz v. Virani, 253 F.3d 641 (11th Cir. 2001)..... 33

Mendoza v. Zirkle Fruit Co., 301 F.3d 1163 (9th Cir. 2002)..... 19

Miller v. Steinbach, 268 F. Supp. 255 (S.D.N.Y. 1967) 32

TABLE OF AUTHORITIES
(continued)

Page

Mohawk Industries, Inc. v. Williams, 546 U.S. 1075 (2005) 17

Mohawk Industries, Inc. v. Williams, 547 U.S. 516 (2006) 17

Overton v. Ohio, 534 U.S. 982 (2001) 8

Rand v. Anaconda-Ericsson, Inc., 794 F.2d 843 (2d Cir. 1986) 29

Rice v. Sioux City Memorial Park Cemetery, 349 U.S. 70 (1955) 8

Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479 (1985) 23

Small v. Sussman, 713 N.E.2d 1216 (Ill. App. Ct. 1999) 29

Trollinger v. Tyson Foods, Inc., 370 F.3d 602 (6th Cir. 2004) 19

United States v. Orena, 32 F.3d 704 (2d Cir. 1994) 17, 20

United States v. Turkette, 452 U.S. 576 (1981) 10

TABLE OF AUTHORITIES
(continued)

Page

Warren v. Mercantile Bank of St. Louis, N.A., 11 S.W.3d 621 (Mo. Ct. App. 1999) 29

Williams v. Mohawk Industries, Inc., 465 F.3d 1277 (11th Cir. 2006) 17, 18, 19

Wilson v. Askew, 709 F. Supp. 146 (W.D. Ark. 1989) 33

STATUTES AND RULES

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-68 1

18 U.S.C. § 1961 ..... 10, 21

18 U.S.C. § 1962 ..... 9, 10, 23

18 U.S.C. § 1964 10

Supreme Court Rule 10 ..... *passim*

Federal Rule of Civil Procedure 50 25

OTHER

Eugene Gressman et al., *Supreme Court Practice* (9th ed. 2007) 9, 17

RESPONDENT VIACOM OUTDOOR INC.'S BRIEF IN OPPOSITION

INTRODUCTION

Respondent Viacom Outdoor Inc. ("Viacom") (now known as CBS Outdoor Inc.), a company that owns and operates outdoor advertising billboards, holds exclusive rights to billboard advertising sites on the property of three railroads. In the proceedings below, petitioners Craig Outdoor Advertising, Inc. ("Craig Outdoor"), Midwest Outdoor Media, LLC ("Midwest Outdoor"), Patriot Outdoor, LLC ("Patriot Outdoor"), and Curtis Massood alleged that Viacom and several Viacom employees, including respondents Wally Kelly and Harold Gustin, violated Connecticut and Missouri law and the civil-remedy provisions of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-68, by denying petitioners' applications for potential billboard advertising sites on railroad property because of an internal determination that licensing the sites would not be in Viacom's best interests.

The United States District Court for the Western District of Missouri dismissed the RICO claims against Viacom on the ground that record evidence failed to establish the essential "enterprise" element of these RICO claims. Pet. App. 53a-55a. The district court also dismissed the claims by petitioner Massood on the ground that he lacked standing because his claims properly belonged not to Massood personally, but to a corporation that he had sold. *Id.* at 35a, 62a-66a. At trial, petitioners dropped their state claims against the employee defendants, pursuing only the remaining RICO claims against them and the state claims against Viacom. Trial Tr.

2155, 2169-81. A jury entered a defense verdict for two employee defendants, *see* Jury Verdict as to RICO, *Craig Outdoor Adver., Inc. v. Viacom Outdoor Inc.*, No. 04-0074-CV-W-DW (W.D. Mo. July 26, 2005), but found in petitioners' favor on the remaining claims against respondents. Pet. App. 4a.

The Eighth Circuit affirmed in part and reversed in part. *Id.* at 47a. As relevant here, the court: (1) affirmed the dismissal of the RICO claims against Viacom; (2) affirmed the dismissal of Massood's claims; and (3) reversed the judgment on the RICO claims against Kelly and Gustin because the evidence failed to establish the "continuity" requirement of the "pattern of racketeering activity" alleged as an essential element of these claims. *Id.* at 38a, 40a-45a, 47a. Although petitioners seek a writ of certiorari as to these three holdings, the Eighth Circuit's rulings on these points reflect the sound application of well-established legal principles to the particular facts of this case. Accordingly, this case presents no issue worthy of this Court's review.

STATEMENT OF THE CASE

1. Petitioners' claims relate to management agreements initially entered into by Outdoor Systems, Inc. ("Outdoor"), a billboard company, with the Burlington Northern & Santa Fe Railway Company ("BNSF"), and by Transportation Displays, Inc. ("TDI"), a firm focused on licensing advertising sites, with the Kansas City Southern Railway Company ("KCS") and Guilford Transportation Industries, Inc. ("Guilford"), the parent company of the Boston & Maine Railroad ("B&M"). Trial Tr. 779, 876-77, 1036-37; Pls.' Exs. 238, 239, 243, Compendium of Trial Exs. ("TrialEx") at 1019-59,

1229-1309, Trial Tr. 59, 539, 1325-26 (admitting exhibits); Second Am. Compl. ¶ 1. Under these management agreements—for which Outdoor and TDI paid millions of dollars in consideration—Outdoor and TDI held exclusive rights to develop or license billboard advertising sites on rights-of-way owned by the three railroads, subject only to the railroads' approval or disapproval on specified grounds. *See* Pls.' Exs. 238, 239, 243, TrialEx at 1023-27, 1044-47, 1238-41. Outdoor's agreement with BNSF obligated the railroad to transfer easements to Outdoor for all licensed sites. Pls.' Ex. 243, TrialEx at 1240-41.

a. Petitioner Curtis Massood alleges that, in January 1998, he contacted Outdoor about several potential billboard sites on BNSF property and was told that Outdoor approved site applications on a "first-come, first-served" basis. Pet. 28; Trial Tr. 1582-85; Second Am. Compl. ¶ 43. Massood applied for the sites on behalf of his billboard company, Wilson-Curtis, Inc. ("Wilson-Curtis"), but Outdoor denied the applications. Pet. 25-26, 28; Pet. App. 35a; Trial Tr. 1585, 1640-41. Massood alleges that Outdoor denied the applications so as to retain the sites for itself. Pet. 26, 28.

Less than a year after the denial of Wilson-Curtis's applications, and despite having discussed the denials with legal counsel, Massood and his partner sold Wilson-Curtis, along with certain billboard sites personally owned by Massood, to Outdoor for $4.2 million. Pet. App. 35a; Trial Tr. 1599, 1648-52. A year after that, in 2000, Massood brought suit in Missouri state court alleging claims based on the denial of his 1998 applications. Pet. App. 66a n.1;

Trial Tr. 1607-08, 1648-49. Those claims were dismissed for lack of standing on the ground that the claims properly belonged not to Massood personally, but to Wilson-Curtis, the corporation that Massood and his partner had sold. Pet. App. 66a n.1; Trial Tr. 1607-08.

b. Through a series of corporate transactions during the late 1990's and 2000-2001, TDI and Outdoor merged into a single business that became Viacom in early 2001. Br. of Appellant Viacom at 8-9, 16-17, *Craig Outdoor Adver., Inc. v. Viacom Outdoor Inc.*, 528 F.3d 1001 (8th Cir. 2008) (No. 06-3337); Trial Tr. 778-79, 1329-30, 1379-82. Viacom thus became the exclusive licensor for billboard sites on BNSF, KCS, and B&M property. Br. of Appellant Viacom at 17; Trial Tr. 539-40, 778-81. Respondent Kelly, who had previously been with Outdoor, became President and CEO of Viacom. Trial Tr. 1327, 1329. Kelly had not been involved in Outdoor's licensing of railroad billboard sites. *Id.* at 1400-02.

In late January 2002, respondent Kelly announced at a meeting of the newly-formed Viacom "landlease" group that Viacom should review license applications for billboard sites on railroad property to determine whether granting the applications was in Viacom's best interests. *Id.* at 1380, 1385-90. Petitioners Craig Outdoor, Midwest Outdoor, and Patriot Outdoor allege that they (or their predecessors) submitted applications for proposed sites in reliance on the belief that Viacom would grant billboard licenses on a "first-come, first-served" basis. These petitioners allege that Viacom denied their applications as a result of its internal review process. Pet. App. 8a-12a.

c. Starting in January 2003, Viacom sent all applicants a letter indicating that Viacom would review all applications for billboard licenses and rule on each application in its "sole discretion." *Id.* at 44a-45a, 72a-73a.

2. In January 2004, petitioners sued respondents Viacom, Kelly, and Gustin, as well as two other Viacom employees, in the United States District Court for the Western District of Missouri. *See* Compl. Alleging that Viacom had defrauded them by failing to disclose that Viacom would review their applications for its own purposes rather than grant them on a first-come, first-served basis, petitioners asserted claims under Missouri and Connecticut law as well as civil RICO. Pet. App. 3a-4a.

Before trial, the district court dismissed all claims by petitioner Massood and the RICO claims against Viacom. Pet. App. 54a-55a, 63a. Like the Missouri court in Massood's earlier suit, the district court held that Massood lacked standing to pursue his claims based on the denial of the 1998 Wilson-Curtis applications, because those claims properly belonged to the corporation, Wilson-Curtis, not to Massood. *Id.* at 63a-65a. As to the RICO claims against Viacom, the court held that petitioners failed to establish the essential "enterprise" element of a RICO claim. *Id.* at 53a-55a. While petitioners alleged that Viacom formed an "association-in-fact" enterprise with each of the three railroads, the court deemed these allegations insufficient as a matter of law because the railroads included in the alleged enterprises were "innocent" parties, not participants in the alleged fraud. *Id.* The members of an association-in-fact enterprise, the court held, "'must share a common

purpose to engage in a particular fraudulent course of conduct and work together to achieve such purposes.'" *Id.* at 54a (quoting *Blue Cross of Cal. v. SmithKline Beecham Clinical Labs., Inc.*, 62 F. Supp. 2d 544, 551 (D. Conn. 1998)). Hence, "an association-in-fact enterprise cannot consist of innocent participants." *Id.*

At trial, petitioners decided not to pursue their state claims against the employee defendants. Trial Tr. 2155, 2169-81. The jury rejected petitioners' claims against two employee defendants, *see* Jury Verdict as to RICO, but found in petitioners' favor on their remaining common-law claims against Viacom and RICO claims against Kelly and Gustin. Pet. App. 3a-4a, 67a-68a.

3. Both petitioners and respondents appealed from the district court's judgment. In a thorough opinion addressing numerous issues, the Eighth Circuit affirmed in part and reversed in part. Three of the court's holdings are implicated by the petition here.

First, the Eighth Circuit affirmed on alternative grounds the district court's rejection of the RICO claims against Viacom. Although the district court had concluded that the alleged association-in-fact enterprises comprised of Viacom and the three railroads lacked any common fraudulent purpose because the railroads were "innocent participants," Pet. App. 54a, the Eighth Circuit held that these alleged associations in fact lacked any "common purpose of any kind—fraudulent or otherwise." *Id.* at 39a. As the Eighth Circuit explained, "[b]y Plaintiffs' own account," Viacom and the railroads were working at cross-purposes: while the railroads aimed to lease

their property as profitably as possible, Viacom allegedly "was operating strictly in its own best interests, appropriating billboard sites and delaying site applications when circumstances dictated that such action would benefit Viacom." *Id.* at 41a. Accordingly, the Eighth Circuit found the record evidence insufficient to establish the essential "common purpose" requirement of an association-in-fact RICO enterprise. *Id.* at 40a-41a.

Second, the Eighth Circuit also deemed the record evidence insufficient to establish the RICO claims against Kelly and Gustin. As the Eighth Circuit explained:

> Plaintiffs' RICO theory is that Kelly and Gustin, individually, through the use of the mails and wires, devised and perpetrated a scheme by which Viacom would profess to follow a first-come, first-served procedure—thereby fraudulently inducing Plaintiffs to submit applications—but would secretly review railroad billboard site applications with the goal of appropriating desired sites for its own use. In other words, the culpable act was using the mails and wires to conceal or misrepresent the review process; it was not the review process itself.

Id. at 44a. The letter transmitted to all applicants beginning in January 2003, however, informed applicants that Viacom would review billboard site applications and grant them in Viacom's "sole discretion." *Id.* at 44a-45a, 73a. Because this letter necessarily terminated any alleged fraudulent scheme based on representations that licenses would be granted on a first-come, first-served basis, the Eighth Circuit held that record evidence failed to

establish the "continuity" requirement of a "pattern of racketeering activity," another necessary element of petitioners' RICO claims. *Id.* at 43a, 45a.

Finally, the Eighth Circuit affirmed the dismissal of petitioner Massood's claims. Like the district court and the Missouri state court, the Eighth Circuit concluded that "[a] shareholder generally may not sue on his own behalf—under Missouri law or RICO—to recover the wrongful diminution in value of his stock or to recoup his share of money taken from the corporation; such claims must generally be pursued in a shareholders derivative action." *Id.* at 35a (citing cases). While Massood urged the court to recognize an equitable exception to this general rule, the Eighth Circuit declined to do so, noting that other courts had likewise "refused to extend a derivative-standing exception" in "analogous situations." *Id.* at 37a.

REASONS FOR DENYING THE WRIT

This Court will expend its limited resources to consider a case on the merits only when there are "compelling reasons" for doing so, such as a conflict on "an important federal question" between lower courts or between the holding of the court below and the decisions of this Court. Sup. Ct. R. 10. A case is not suitable for review when the issue on which review is sought is narrowly fact-bound, *see, e.g.*, *Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 74 (1955), or when the petition seeks mere error-correction with respect to an alleged misapplication of settled law, *see* Sup. Ct. R. 10; *Gonzalez v. Crosby*, 545 U.S. 524, 544 n.7 (2005) (Stevens, J., dissenting); *Overton v. Ohio*, 534 U.S. 982, 985 (2001) (Breyer, J., dissenting from denial of certiorari). A "genuine

conflict" in authority meriting this Court's review arises only "when it may be said with confidence that two courts have decided the same legal issue in opposite ways, based on their holdings in different cases with very similar facts." Eugene Gressman et al., *Supreme Court Practice* § 4.3, at 242 (9th ed. 2007).

This case does not qualify for review under these standards. In rejecting petitioners' RICO claims against Viacom, reversing the RICO judgments against Kelly and Gustin, and holding that petitioner Massood lacked standing to pursue his claims, the Eighth Circuit correctly applied settled legal principles to the particular facts of this case, creating neither any new principle of law nor any conflict with decisions of other courts.

I. THE EIGHTH CIRCUIT'S REJECTION OF THE RICO CLAIMS AGAINST VIACOM IS NOT WORTHY OF REVIEW

A. The Eighth Circuit Correctly Held That Petitioners Failed To Establish the "Common Purpose" Requirement of Their RICO Claims

In affirming the district court's award of summary judgment in Viacom's favor on petitioners' RICO claims against Viacom, the Eighth Circuit correctly determined that the record evidence in this case was legally insufficient to satisfy the essential "enterprise" element of a RICO claim. Such a fact-bound—and legally correct—determination is plainly not worthy of this Court's review.

RICO section 1962(c) prohibits "conduct[ing] or participat[ing], directly or indirectly, in the conduct of [an] enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt."

18 U.S.C. § 1962(c); *see also id.* § 1962(d) (prohibiting conspiracy to violate § 1962(c)); *id.* § 1964(c) (establishing cause of action for damages based on violations of § 1962). The statute defines the key term "enterprise" in this provision to "include[] any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." *Id.* § 1961(4). Under decades-old precedent of this Court, a group may constitute an "association-in-fact" enterprise under the statute only if its members (1) "associated together for a common purpose of engaging in a course of conduct," (2) formed "an ongoing organization, formal or informal," and (3) "function[ed] as a continuing unit." *United States v. Turkette*, 452 U.S. 576, 583 (1981). Here, petitioners alleged that Viacom formed an association-in-fact enterprise with each of the railroads with which it had licensing agreements. But, applying *Turkette* to the facts of this case, the Eighth Circuit correctly recognized that no record evidence established the first *Turkette* requirement, i.e., common purpose. Pet. App. 41a.

As the Eighth Circuit put it, on the particular facts of this case, "Plaintiffs have failed to establish that the alleged association-in-fact enterprises shared a common purpose of any kind—fraudulent or otherwise." *Id.* at 39a. Indeed, far from sharing a common purpose, the railroads—according to petitioners' own allegations—were "victim[s]" of Viacom's alleged scheme: while the railroads contracted with Viacom to license advertising sites for the railroads' benefit, plaintiffs maintained that Viacom in fact used its licensing rights to benefit itself at the railroads' expense. Second Am. Compl.

¶¶ 162-64, 206-08. In other words, "[b]y Plaintiffs' own account, Viacom was operating strictly in its own best interests, appropriating billboard sites and delaying site applications when circumstances dictated that such action would benefit Viacom." Pet. App. 41a.

In so finding, the Eighth Circuit identified numerous inconsistencies between the allegation of common purpose and the facts petitioners alleged.

First, "Plaintiffs described several instances in which Viacom's conduct resulted in sites being 'spaced out' by billboards erected on neighboring property, thus preventing the affected railroad from ever benefiting from a billboard located on its property." *Id.* ("Spacing out" is an industry term-of-art referring to the placement of a neighboring billboard too close to permit use of the proposed site under applicable billboard spacing laws. *Id.* at 48a n.3; Trial Tr. 231-32.) This alleged conduct could serve Viacom's interest in limiting competition at the expense of the railroads' interest in profitably leasing their property. Hence, "[i]t is unlikely that the railroads would cooperate with Viacom to achieve this goal." Pet. App. 41a.

Second, "Plaintiffs . . . described how Viacom hoped to discourage site applicants who intended to resell their billboards or licenses for what Viacom believed were undeserved profits." *Id.* Again, these alleged actions could serve Viacom's interest in preventing "undeserved" profits for competitors, not the railroads' interest in leasing their property to whoever would pay for it. As the Eighth Circuit explained: "We cannot conceive how this goal was shared by any of the railroads, which presumably did

not care who held the license for a particular billboard site as long as fees were paid." *Id.*

Finally, "Plaintiffs also alleged that Viacom operated these RICO enterprises with a goal of eliminating competition in its billboard markets"—yet another objective that could benefit Viacom but not the railroads, "since competition for billboard sites on railroad property would presumably be in the railroads' best interests." *Id.* "In short," the Eighth Circuit summed up, "the Plaintiffs failed to allege sufficient facts to demonstrate Viacom and each of the three railroads had a 'common purpose of engaging in a course of conduct.'" *Id.* (quoting *Turkette*, 452 U.S. at 583).

Given petitioners' overall theory of the case and the unique fact-pattern here, the Eighth Circuit's conclusion that, on the particular facts of this case, Viacom and the railroads lacked the requisite "common purpose" under RICO was manifestly correct. In cases in which a common purpose among enterprise members is similarly lacking, courts have routinely rejected RICO claims. *See, e.g.*, *In re Lupron Mktg. & Sales Practices Litig.*, 295 F. Supp. 2d 148, 173 (D. Mass. 2003) (finding no common purpose in the sense of "coordinated activity in pursuit of a common objective"); *Blue Cross*, 62 F. Supp. 2d at 553 (rejecting enterprise allegations where alleged participants "lack not only a common *fraudulent* purpose, but any common purpose at all"); *First Nationwide Bank, FSB v. Gelt Funding, Corp.*, 820 F. Supp. 89, 98 (S.D.N.Y. 1993) (rejecting mortgage-fraud enterprise allegations where each borrower included in the alleged enterprise "acted on a particular occasion to benefit himself or herself and

not to assist any other borrower"), *aff'd*, 27 F.3d 763 (2d Cir. 1994).

Furthermore, even were the Eighth Circuit's enterprise holding debatable—which it is not—petitioners' RICO claims against Viacom would fail in any event because petitioners presented legally insufficient evidence of a "pattern of racketeering activity," another essential RICO element. *See infra* at 22-25. For this very reason, the Eighth Circuit rejected RICO claims against the individual defendants, Kelly and Gustin. Pet. App. 45a. This holding, as explained below, is not only entirely correct on the facts of this case but also completely unworthy of this Court's review. *See infra* at 22-25. Because the same predicate acts are alleged in the counts against Viacom as in the counts against Kelly and Gustin, *see* Second Am. Compl. ¶¶ 148-52, the Eighth Circuit's pattern holding applies equally to the RICO claims against Viacom, thus providing a fully adequate alternative justification for the dismissal of these claims.

In sum, in affirming the rejection of petitioners' RICO claims against Viacom, the Eighth Circuit simply applied *Turkette*'s common purpose requirement to the facts of this case and reached a correct result consistent with the decisions of other courts. In addition, the Eighth Circuit's equally correct—and equally fact-bound—holding that petitioners presented insufficient evidence of a RICO pattern supports dismissal of these claims. There is plainly no "compelling reason[]" for this Court to review the Eighth Circuit's fact-bound application of settled law to these claims. Sup. Ct. R. 10.

Nor is there any reason to hold this case for *Boyle v. United States*, 129 S. Ct. 29 (2008) (granting certiorari) (No. 07-1309). The question presented in that case—whether "proof of an association-in-fact under [RICO] require[s] at least some showing of an ascertainable structure beyond that inherent in the pattern of racketeering activity in which it engages," Pet. for Writ of Cert. at i, *Boyle*, 129 S. Ct. 29 (No. 07-1309)—is not presented here, and the Eighth Circuit's holdings provide an independent basis for rejecting petitioners' RICO claims against Viacom, regardless of the outcome in *Boyle*.

B. Petitioners' Arguments for Review of This Issue Are Meritless

1. Petitioners Mischaracterize the Eighth Circuit's Holding

Endeavoring to make this issue appear worthy of certiorari when it is not, petitioners repeatedly misstate the Eighth Circuit's holding, claiming that the court held that "members of an association-in-fact enterprise cannot have 'divergent goals.'" Pet. 7; *see also id.* at 9, 10, 13. According to petitioners, this putative holding establishes a "new requirement," *id.* at 9; petitioners thus accuse the Eighth Circuit of "narrowing" RICO, *id.*, "'rewrit[ing]'" the statute, *id.* at 10 (quoting *Bridge v. Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131, 2145 (2008)), and defying this Court's precedent, *id.* at 8-10. In fact, petitioners are rewriting the Eighth Circuit's decision.

The Eighth Circuit concluded only that there was *no* legally cognizable common purpose on the facts of this case, not that there was some common purpose but also divergent purposes that prevented the alleged associations in fact from forming an

"enterprise." Indeed, the court could not have been more explicit on this point. While the district court dismissed the RICO claims against Viacom on the ground that Viacom and the railroads shared no common *fraudulent* purpose, because the enterprise included "innocent participants," Pet. App. 54a, the Eighth Circuit avoided that issue by holding that "Plaintiffs have failed to establish that the alleged association-in-fact enterprises *shared a common purpose of any kind—fraudulent or otherwise*." *Id.* at 39a (emphasis added).

To be sure, the Eighth Circuit at one point commented that "'divergent goals' among members of a purported association-in-fact enterprise is a 'fatal problem' to a RICO claim." *Id.* at 41a (quoting *Baker v. IBP, Inc.*, 357 F.3d 685, 691 (7th Cir. 2004)). But petitioners grossly misconstrue this statement in claiming that the Eighth Circuit rejected petitioners' enterprise theory because of "divergent" purposes even though some common purpose existed. In context, it is clear that the Eighth Circuit viewed the purposes here as *entirely* divergent. As the court explained in the sentence immediately preceding the challenged statement: "the Plaintiffs failed to allege sufficient facts to demonstrate Viacom and each of the three railroads had a 'common purpose of engaging in a course of conduct.'" *Id.* (quoting *Turkette*, 452 U.S. at 583).

Petitioners' fulminations about the Eighth Circuit's "rewriting" of the statute and departure from precedent are predicated on an entirely false depiction of the Eighth Circuit's decision. Far from inventing novel requirements, the Eighth Circuit simply applied the settled "common purpose"

requirement of *Turkette* and properly concluded that no common purpose could be found on the facts of this case.

2. The Common Purpose Identified by Petitioners Is Not Supported by the Record and Was Properly Rejected by the Eighth Circuit

To buttress their inaccurate assertion that the Eighth Circuit rejected their enterprise theory despite the existence of a common purpose, petitioners claim that the record in fact established a common purpose of "leasing property owned by the railroads to outdoor billboard businesses." Pet. 16. Yet the Eighth Circuit expressly—and properly—held that, as a matter of law, the evidentiary record did not establish this claimed common purpose.

Directly addressing petitioners' proposed common purpose, the Eighth Circuit stated: "We disagree with this characterization. Viacom's purposes and the railroads' purposes were not sufficiently aligned under the facts of this case to prove the existence of a RICO enterprise." Pet. App. 40a-41a. The Eighth Circuit went on to explain, using the examples discussed above of "spacing out" proposed sites, discouraging reseller applicants, and eliminating competition, *see supra* at 11-12, that Viacom and the railroads did not in fact share the goal of leasing railroad-owned property. Pet. App. 41a. Viacom, according to petitioners' own allegations, advanced its own interests in monopolizing billboard sites and eradicating competition at the expense of the railroads' interest in leasing their property as profitably as possible. *Id.*

The Eighth Circuit's holding on this point reflects a straightforward application of the "common purpose" requirement to particular facts. It does not present any "compelling reason[]" for this Court's review. Sup. Ct. R. 10.

3. Petitioners Identify No Legitimate Split in Judicial Authority

Petitioners also claim that the Eighth Circuit's decision conflicts with two other circuit decisions: *Williams v. Mohawk Industries, Inc.*, 465 F.3d 1277 (11th Cir. 2006), and *United States v. Orena*, 32 F.3d 704 (2d Cir. 1994). But the alleged conflicts are illusory. *Mohawk* and *Orena* are not cases "decid[ing] the same legal issue in opposite ways, based on . . . very similar facts," as required to justify expenditure of this Court's limited resources for review. Gressman, *supra*, § 4.3, at 242. These cases are in fact entirely distinguishable.

a. The Eighth Circuit's Decision Does Not Conflict with *Mohawk*

In *Mohawk*, this Court granted certiorari to consider "[w]hether a defendant corporation and its agents can constitute an 'enterprise,'" *see Mohawk*, 465 F.3d at 1281; *Mohawk Indus., Inc. v. Williams*, 546 U.S. 1075 (2005), but then dismissed the writ of certiorari on that question as improvidently granted and vacated and remanded for consideration in light of the proximate cause holding of *Anza v. Ideal Steel Supply Corp.*, 547 U.S. 451 (2006). *See Mohawk Indus., Inc. v. Williams*, 547 U.S. 516 (2006). On remand, the Eleventh Circuit reaffirmed its earlier holding that the plaintiffs in the case properly alleged a RICO association-in-fact enterprise comprised of a corporate employer and its

independent-contractor agents who allegedly recruited illegal-alien labor for the company. The Eleventh Circuit deemed these allegations sufficient because the employer and the third-party recruiters were "distinct entities that, at least according to the complaint, [were] engaged in a conspiracy to bring illegal workers into this country for [the employer's] benefit." 465 F.3d at 1284.

Petitioners mistakenly assert that this holding conflicts with the Eighth Circuit's "common purpose" holding. In fact, the Eighth Circuit's decision in this case is entirely consistent with *Mohawk*. Not only did *Mohawk* involve a markedly different factual context from this case—a conspiracy to recruit illegal labor, as opposed to a scheme by a railroad's leasing agent to abuse its position—but the theory of common purpose in *Mohawk* was radically different from, and not nearly as internally inconsistent as, the theory of common purpose offered here. In *Mohawk*, the agents included in the enterprise (recruiters of illegal-alien workers) acted as agents *for purposes of carrying out the alleged illegal scheme*. Thus, whatever divergent purposes they may also have held, both the principal and the agents shared at least one clear common purpose—perpetrating a scheme to hire illegal workers. *See id.* at 1284-85 (finding common purpose because "the members of the enterprise stand to gain sufficient financial benefits from [the employer's] widespread employment and harboring of illegal workers"). Here, in contrast, Viacom allegedly perpetrated a scheme in which the railroads took no part and had no interest—indeed, a scheme in which, according to the petitioners' own complaint, the railroads were "victim[s]." Second Am. Compl. ¶¶ 162-64, 206-08.

It is true that the Eighth Circuit favorably cited *Baker*, a Seventh Circuit decision, also involving an alleged association in fact of an employer and illegal-labor recruiting agents, which the Eleventh Circuit in *Mohawk* described as "in conflict" with its own decision. 465 F.3d at 1285. But *Baker* did not squarely address the common-purpose question; it simply observed in passing, before rejecting the enterprise allegations on other grounds, that "it is not altogether clear how this 'association in fact' has a common purpose." 357 F.3d at 691. In any event, even assuming that *Mohawk* and *Baker* conflict with each other, this case does not implicate the alleged conflict. The Eighth Circuit's holding that there was no legally cognizable common purpose on the facts of this case involves a markedly different factual situation and thus is distinguishable from both the Eleventh Circuit's decision in *Mohawk* and the Seventh Circuit's dicta in *Baker*.

Though petitioners describe *Mohawk* as "consistent with recent decisions" of three circuits, Pet. 11 & n.8, none of the decisions they cite even considers whether or not a common purpose existed. *See Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 612 (6th Cir. 2004) (addressing issues of RICO standing and proximate cause); *Mendoza v. Zirkle Fruit Co.*, 301 F.3d 1163, 1168 (9th Cir. 2002) (addressing issue of RICO standing); *Commercial Cleaning Servs., L.L.C. v. Colin Serv. Sys., Inc.*, 271 F.3d 374, 380-81 (2d Cir. 2001) (addressing issues of RICO standing and proximate cause). At best, then, *Mohawk* is implicated in a shallow split with dicta in one other case on a question that is not presented here and could not be resolved on these facts. *Mohawk* and

Baker do not support petitioners' ill-conceived argument for review.

b. The Eighth Circuit's Decision Also Does Not Conflict with *Orena*

The second case invoked by petitioners, *Orena*, is even farther afield than *Mohawk*. Petitioners claim that the Eighth Circuit's holding would have prevented the prosecution in *Orena*, which held that a mafia family constituted a RICO enterprise even though its members were engaged in an internal control struggle. 32 F.3d at 710. This argument is nonsense.

Orena involved the quintessential RICO enterprise: a mafia family. Whatever their differences, the Mafiosi identified as enterprise members in *Orena* indisputably shared the common purpose of advancing the enterprise's criminal activities. Indeed, as the Second Circuit explained, the alleged divergence of interests in that case—a struggle for control within the family—reinforced the conclusion that the group formed an enterprise, for it showed that there was a cohesive entity to be controlled. *Id.* In contrast, as the Eighth Circuit held based on its review of the factual record, there was no common purpose in this case; hence, the divergent purposes of the members only highlighted the absence of common purpose. Accordingly, this case has no bearing on *Orena* and will have no impact on similar prosecutions.

C. This Case Is a Poor Vehicle for Reviewing the Common Purpose Issue

In any event, this case is not a sound vehicle for review of the Eighth Circuit's common-purpose holding, as there are at least four alternative

justifications for the Eighth Circuit's decision dismissing the RICO claims against Viacom.

First, these claims fail regardless of the presence or absence of "common purpose" because petitioners presented insufficient evidence of a RICO "pattern." *See supra* at 13; *infra* at 22-25.

Second, according to petitioners' own complaint, the railroads included in the alleged association-in-fact enterprises were "victim[s]" of Viacom's alleged fraudulent scheme. Second Am. Compl. ¶¶ 162-64, 206-08. As the district court recognized, an association-in-fact RICO enterprise cannot, as a matter of law, include even "innocent participants," let alone victims. Pet. App. 54a.

Third, since Viacom was the sole perpetrator of the alleged fraudulent scheme here, petitioners' inclusion of the railroads in the alleged association-in-fact enterprises reflects a transparent effort to circumvent the settled rule that the same entity cannot serve as both RICO defendant and enterprise. *See, e.g., Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 995 (8th Cir. 1989) ("the person named as the defendant cannot also be the entity identified as the enterprise").

Finally, RICO's plain text does not permit the inclusion of corporate entities in an association-in-fact enterprise. Again, the statute defines the term "enterprise" to include "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). The first clause of the definition thus distinguishes between "individual[s]" and "corporation[s]," and the second clause limits association-in-fact enterprises to

"individuals." Accordingly, at oral argument in *Mohawk*—in which the Court initially granted a writ of certiorari to consider this question—a majority of the justices expressed skepticism about the inclusion of corporations in an association-in-fact enterprise. *See* Tr. of Oral Argument at 29-32, 44-45, *Mohawk*, 547 U.S. 516 (No. 05-465) ("[I]t does seem kind of strange to encompass [corporations] under the term individuals when the same statute uses individuals and corporations separately." (statement of Roberts, C.J.)). Nevertheless, petitioners here have alleged RICO association-in-fact enterprises composed solely of corporate entities (Viacom and the railroads).

For all these reasons, petitioners' RICO claims against Viacom must fail regardless of the common-purpose issue on which the Eighth Circuit rested its decision. Thus, quite apart from the fact that petitioners identify no "compelling reason" to grant certiorari and instead merely seek error-correction with respect to a fact-bound and legally correct holding, review of petitioners' first question would be a waste of this Court's limited resources.

II. THE EIGHTH CIRCUIT'S REJECTION OF RICO CLAIMS AGAINST KELLY AND GUSTIN IS ALSO NOT WORTHY OF REVIEW

A. The Eighth Circuit Correctly Applied Settled Law in Concluding that Petitioners Presented Insufficient Evidence of a RICO Pattern

The Eighth Circuit's rejection of the RICO claims against the individual Viacom employees Kelly and Gustin is equally unworthy of this Court's review. With respect to these claims, the Eighth Circuit held, based on a correct application of settled legal

standards, that petitioners presented insufficient evidence of a "pattern of racketeering activity"—another essential element of a RICO claim. *See* 18 U.S.C. § 1962(c); *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 (1985).

Although petitioners based their RICO claims against Kelly and Gustin on an alleged pattern of mail and wire fraud, petitioners made no allegation, and presented no evidence, that they relied on any misrepresentation personally made by Kelly or Gustin. Second Am. Compl. ¶¶ 141-42; Trial Tr. 180-81, 783-84, 1352-53. Nevertheless, the Eighth Circuit "assum[ed] for the sake of argument that Kelly and Gustin engaged in the predicate acts of mail and wire fraud as alleged." Pet. App. 43a. As the court explained: "Even if we assume that [petitioners'] evidence was adequate to support the jury's conclusion that Kelly and Gustin committed the necessary predicate acts of mail fraud and wire fraud, we hold that the evidence was insufficient to support the jury's conclusion that Kelly and Gustin engaged in a pattern of racketeering activity as is also necessary for RICO liability." *Id.*

Under longstanding precedent of this Court, a RICO "pattern" requires a showing of "continuity," that is, a showing that the predicate crimes included in the alleged pattern either took place within a "closed period of repeated conduct" (so-called "closed-ended continuity") or amounted to "past conduct that by its nature projects into the future with a threat of repetition" (so-called "open-ended continuity"). *H.J. Inc. v. Nw. Bell Tel. Co.*, 492 U.S. 229, 241 (1989). Here, the Eighth Circuit applied *H.J. Inc.*'s holding to the particular facts of this case and correctly

determined that, because Viacom terminated the alleged pattern of racketeering acts and thus removed any threat of repetition, the evidence did not, as a matter of law, establish open-ended continuity, the only type that petitioners attempted to prove. Pet. App. 44a-45a. Petitioners do not claim that the Eighth Circuit misstated *H.J. Inc.*'s holding; they disagree only with the court's entirely correct application of that holding. Such a fact-bound claim that the Eighth Circuit "misappli[ed] . . . a properly stated rule of law" is not worthy of this Court's attention. Sup. Ct. R. 10.

As the Eighth Circuit explained, petitioners' theory of liability was that Kelly and Gustin "devised and perpetrated a scheme by which Viacom would profess to follow a first-come, first-served procedure . . . but would secretly review railroad billboard site applications with the goal of appropriating desired sites for its own use." Pet. App. 44a. This alleged scheme necessarily terminated in January 2003 because at that point Viacom began transmitting a form letter advising all applicants that approval of proposed billboard sites would be "given or denied at the sole discretion" of Viacom and that any action undertaken by the applicant prior to Viacom's approval was "taken at [the applicant's] sole risk and expense." *Id.* at 44a-45a, 72a-73a.

The Eighth Circuit correctly recognized that, after receiving the January 2003 letter, no applicant could claim that it believed licenses would simply be awarded on a first-come, first-served basis. "[B]y expressly notifying site applicants that Viacom would review all applications for billboard licenses and rule on each application in its discretion," "Viacom

effectively terminated any allegedly fraudulent scheme Kelly and Gustin conducted." *Id.* at 45a. In addition, "there was no evidence that the review process would continue to be concealed or misrepresented by Kelly, Gustin, or any other Viacom employee in the future." *Id.* Hence, the record evidence was insufficient as a matter of law to establish the required showing of continuity as to Kelly and Gustin. *Id.*

The evidence discussed by the Eighth Circuit manifestly supports its conclusion, and in any event the Eighth Circuit's decision was nothing more than the application of settled law (the continuity standard) to particular facts. This issue does not satisfy this Court's criteria for review.

B. Petitioners' Arguments for Review Are Meritless

1. Attempting to justify review of the Eighth Circuit's fact-bound pattern holding, petitioners assert that the Eighth Circuit "usurp[ed] . . . the jury's role" by deeming the evidence of continuity insufficient even though the January 2003 letter had been presented to the jury. Pet. 19-23. This is just another way of saying that petitioners disagree with the Eighth Circuit's conclusion that, under *H.J. Inc.*, the evidence was legally insufficient to support the jury's verdict. In fact, the Eighth Circuit properly fulfilled its role in reviewing the legal sufficiency of the evidence under Federal Rule of Civil Procedure 50.

2. Just as petitioners misstate the Eighth Circuit's enterprise holding in an unjustified effort to obtain Supreme Court review, *see supra* at 14-16, so,

too, do they mischaracterize the court's pattern holding.

First, petitioners incorrectly assert that the Eighth Circuit "narrow[ed]" RICO and "commandeer[ed] the jury's fact-finding role" in violation of this Court's "clear instruction that RICO must not be limited based on judicial policy concerns." Pet. 24 (citing *Bridge*, 128 S. Ct. at 2145). Petitioners base this fanciful suggestion on the Eighth Circuit's passing observation that "[w]e have in the past rejected attempts to convert ordinary civil disputes into RICO cases." Pet. App. 45a (citing *Terry A. Lambert Plumbing, Inc. v. W. Sec. Bank*, 934 F.2d 976, 981 (8th Cir. 1991)). But this statement is unremarkable and indisputably correct: even petitioners must recognize that RICO has distinct requirements (e.g., the pattern and enterprise elements) from other civil causes of action. Furthermore, as the Eighth Circuit made clear in the very next sentence of its opinion, the court did not hold that petitioners' evidence was insufficient *because* this was an "ordinary civil dispute[]." It held, rather, that "[a]lthough Plaintiffs have presented evidence sufficient to establish violations of state law, they have not presented sufficient evidence to satisfy the more onerous requirements of RICO." *Id.*

Second, petitioners claim incorrectly that the Eighth Circuit's RICO pattern holding contradicts its ruling on the common-law fraud claims. Pet. 19. In fact, these two holdings by the Eighth Circuit were consistent because they addressed distinct issues. As this Court explained in *Bridge*, common-law fraud and RICO predicate acts of mail and wire fraud are distinct types of claims; they do not carry identical

requirements. 128 S. Ct. at 2141-42. Here, while the common-law claims were based on particular acts of alleged fraud, the RICO claims advanced by petitioners required an ongoing scheme to defraud. With respect to the common-law fraud claims, the Eighth Circuit deemed the evidence sufficient under Missouri and Connecticut law based on testimony that corporate employees misled petitioners Patriot Outdoor, Midwest Outdoor, and Craig Outdoor—all of whom applied for sites before January 2003—about how Viacom processed applications. Pet. App. 8a-12a. In contrast, with respect to the RICO claims, the Eighth Circuit held that petitioners failed to establish the continuity requirement as to Kelly and Gustin because any alleged scheme to defraud was terminated in January 2003 when Viacom began informing applicants that Viacom would review and approve or reject applications in its sole discretion.

3. Finally, petitioners accuse the Eighth Circuit of "rebellion," "open defiance of controlling authority," "breed[ing] contempt for the rule of law," and even rendering this Court's precedents "dead letters." Pet. 19, 23, 25. These hyperbolic declamations are utterly baseless. Petitioners identify no case—from this Court or any other court—that reaches a conflicting result on similar facts. Instead, they assert merely that the Eighth Circuit's decision violates this Court's general instruction in *Bridge* that courts should not limit RICO suits as a matter of policy based on "a preconceived notion of what Congress intended to proscribe." 128 S. Ct. at 2145. As explained, the Eighth Circuit imposed no new limitation on RICO suits; it simply applied settled standards for a RICO pattern to the facts of this case and concluded that petitioners' evidence fell short.

III. THE EIGHTH CIRCUIT'S HOLDING THAT PETITIONER MASSOOD LACKS STANDING IS NOT WORTHY OF REVIEW

A. The Eighth Circuit Correctly Applied Settled Principles of Shareholder Standing to the Facts of This Case

Petitioners' last question presented seeks review of the Eighth Circuit's holding that petitioner Curtis Massood lacks standing to sue individually, as opposed to derivatively, for losses due to Viacom's alleged fraudulent denial of Wilson-Curtis's billboard applications. There is no "compelling reason[]" consistent with this Court's standards to review this question. Sup. Ct. R. 10.

As the Eighth Circuit observed, Massood "apparently knew about Viacom's alleged appropriation of the three Wilson-Curtis billboard sites roughly six months before he sold his Wilson-Curtis shares to Viacom" (when he was already speaking with lawyers about his case). Pet. App. 49a-50a n.11; Trial Tr. 1652. Nevertheless, Massood did not attempt to bring a derivative suit before selling the company. Instead, Massood sued, first in state court and then (after his state claims were dismissed) in this litigation, for damages based on the alleged loss in value to his shares in Wilson-Curtis.

As the Eighth Circuit recognized, "[a] shareholder generally may not sue on his own behalf—under Missouri law or RICO—to recover the wrongful diminution in value of his stock or to recoup his share of money taken from the corporation; such claims must generally be pursued in a shareholders derivative action." Pet. App. 35a (citing cases). While Massood urged the court to recognize an

equitable exception to this general rule here, the Eighth Circuit properly declined to do so; it noted that other courts have likewise "refused to extend a derivative-standing exception" in "analogous situations." *Id.* at 37a. *See, e.g.*, *Lakonia Mgmt. Ltd. v. Meriwether*, 106 F. Supp. 2d 540, 550-51 (S.D.N.Y. 2000) (holding that shareholder could bring RICO claims based on diminution in stock value only as derivative suit); *Warren v. Mercantile Bank of St. Louis, N.A.*, 11 S.W.3d 621, 622 (Mo. Ct. App. 1999) (applying general rule that "[a] shareholder is without standing to sue in his individual capacity for damages to the corporation"); *Small v. Sussman*, 713 N.E.2d 1216, 1220-21 (Ill. App. Ct. 1999) (holding that only derivative suit is possible where "all shareholders are injured uniformly"); *Rand v. Anaconda-Ericsson, Inc.*, 794 F.2d 843, 849 (2d Cir. 1986) (holding that shareholders lacked standing to sue under RICO based on diminution in stock value).

Because the Eighth Circuit's decision is correct under governing precedent, and because in any event the Eighth Circuit's holding was nothing more than the fact-bound application of a settled general rule of shareholder standing to particular facts, this issue is unworthy of this Court's attention.

B. Petitioner Massood's Arguments for Review Are Meritless

1. Massood's Standing Theory Is Novel and Unsupported

Petitioner Massood appears to recognize that ordinarily shareholders may sue only derivatively for losses to a corporation. Indeed, he further concedes that as a general rule "an individual only has standing to pursue a derivative suit on behalf of a

corporation if he/she is presently a shareholder in the corporation." Pet. 26. Nonetheless, Massood insists that "equity demands a different rule in the unusual situation" presented here. *Id.* Specifically, Massood claims that, as a matter of equity, he should be able to recover individually for the loss in value to his shares because "the fraudulent activity of the wrongdoer (Viacom) enabled it to buy the corporation (Wilson-Curtis) victimized by its wrongful conduct." *Id.* This argument finds no support in the case law and presents no "compelling reason[]," Sup. Ct. R. 10, for this Court to review it.

To begin with, Massood's argument for equitable standing is novel and unsupported. Though he cites several cases as supposed authority for his position, the Eighth Circuit concluded that these cases in fact hold only that a shareholder "who continued to own shares in the surviving corporation" may "pursue a derivative claim on behalf of [a] corporation that was acquired in [a] merger"; "in none of those cases did the court permit the shareholder to recover individually for derivative claims." Pet. App. 36a (discussing *Blasband v. Rales*, 971 F.2d 1034, 1046 (3d Cir. 1992); *Mendell ex rel. Viacom, Inc. v. Gollust*, 909 F.2d 724, 729 (2d Cir. 1990); *Keyser v. Commonwealth Nat'l Fin. Corp.*, 120 F.R.D. 489, 493 (M.D. Pa. 1988), *superseded by statute as stated in B.T.Z., Inc. v. Grove*, 803 F. Supp. 1019, 1022 (M.D. Pa. 1992); *Miller v. Steinbach*, 268 F. Supp. 255, 268-69 (S.D.N.Y. 1967)). Here, Massood sold his shares in Wilson-Curtis and owns no interest in the surviving corporation, Viacom. Abundant case law supports the Eighth Circuit's denial of standing in this circumstance. *See supra* at 28-29.

Furthermore, contrary to Massood's claims, the equities of this case do not support recognizing an exception to ordinary shareholder standing principles. As the Eighth Circuit observed, Massood "apparently knew about" the alleged wrongdoing some six months before he sold the company to Viacom, yet he proceeded with the sale without attempting to bring a derivative action. Pet. App. 49a-50a n.11. Given that Massood slept on his rights and indeed consented to the situation that he now complains about (ownership of the alleged victim company's stock by the alleged wrongdoer Viacom), Massood's position finds no support in equitable considerations.

Finally, even were Massood correct on the merits—which he is not—that he should be granted equitable standing, res judicata and collateral estoppel would bar the Eighth Circuit from reaching that result, as the Missouri state court rejected nearly identical claims based on lack of standing. *See* Pet. App. 66a. And, in any event, Massood's petition at best seeks error-correction with respect to the Eighth Circuit's application of settled shareholder standing principles to particular facts.

2. Massood's Standing on His Non-RICO Claims Does Not Present a Federal Issue

Review of the Eighth Circuit's standing decision on Massood's non-RICO claims would be inappropriate for yet another reason: shareholder standing on these claims presents a question of state, not federal, law. Massood, of course, suggests otherwise, declaring in his argument heading that this case presents a "substantial question of federal law." Pet. 25. But the very cases he cites make plain that

shareholder standing on state claims depends on state law. *See, e.g.*, *Blasband*, 971 F.2d at 1046 (applying "Delaware's statutory and common law standing requirements"); *cf. Miller*, 268 F. Supp. at 268 (analyzing standing as a matter of federal law rather than state law only because cause of action was federal). Accordingly, the court's ruling on these claims presents no "important federal question" appropriate for this Court to review. Sup. Ct. R. 10.

3. Case Law Does Not Support Massood's Standing on His RICO Claims

As for his RICO claims, Massood concedes that equitable standing "has never been applied to RICO actions." Pet. 27. To quote the district court: "Federal courts have held repeatedly that shareholders of a corporation lack standing as individuals to bring a RICO action for diminution in the value of their stock allegedly caused by racketeering activities conducted against the corporation." Pet. App. 64a (quoting *Miller v. Loucks*, No. 91-C-6539, 1992 WL 329313, at *12 n.5 (N.D. Ill. Nov. 5, 1992)) (internal quotation marks omitted); *see also, e.g.*, *Brennan v. Chestnut*, 973 F.2d 644, 648 (8th Cir. 1992) ("A shareholder may not maintain an action for an injury to a corporation resulting in a diminution in the value of shares under RICO absent a showing of individual and direct injury to the shareholder."); *Lakonia Mgmt.*, 106 F. Supp. 2d at 551 ("a shareholder cannot assert individual standing under RICO where all the shareholders of a corporation have experienced the same injury").

Massood nonetheless argues that this Court should uphold his standing to bring RICO claims because respondents, "through their pattern of racketeering,"

allegedly "improved their competitive position vis-à-vis Massood" in the billboard business, in which Massood alleges he still participates. Pet. 32. This assertion is meritless for multiple reasons.

First, Massood's competitive-injury argument is inconsistent with petitioners' own complaint, which specifically alleged that "Massood seeks to recover the loss he suffered as a result of the lost value in the Wilson-Curtis shares he owned caused by [Viacom's] scheme to reduce the value of Wilson-Curtis." First Am. Compl. ¶ 55. Second, the district court, in granting summary judgment on a RICO claim not at issue here, held based on the record that it was "pure speculation" that respondents' alleged conduct "ma[de] it more difficult for [petitioners] to compete with [Viacom]." Pet. App. 56a. Third, the cases Massood cites on this issue do not remotely support his competitive-injury standing theory on the facts of this case. *See Maiz v. Virani*, 253 F.3d 641, 655 (11th Cir. 2001) (upholding individual RICO claims where "the majority of the alleged wrongdoing—including the primary wrong . . . —occurred, and the lion's share of the sought-after damages were incurred, well in advance of the chartering of the corporations"); *Wilson v. Askew*, 709 F. Supp. 146, 153 (W.D. Ark. 1989) (holding that loss of fraudulently induced "initial investment" in company was individual injury); *Heart of Am. Grain Inspection Serv., Inc. v. Mo. Dep't of Agric.*, 123 F.3d 1098, 1102 (8th Cir. 1997) (finding individual injury where challenged actions of state agency prevented plaintiffs from practicing their trade). Finally, as explained above in Part II, the Eighth Circuit correctly held that respondents did not in fact engage in a pattern of racketeering activity, so Massood's

RICO claims must fail in any event, regardless of whether he may properly claim standing.

In sum, there is no "compelling reason[]," Sup. Ct. R. 10, to grant a writ of certiorari on this issue or any other issue raised by petitioners.

CONCLUSION

Respondent Viacom respectfully requests that this Court **DENY** the petition for a writ of certiorari in this case.

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114

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IN THE

Supreme Court of the United States

CRAIG OUTDOOR ADVERTISING, INC., CURTIS MASSOOD, MIDWEST OUTDOOR MEDIA, LLC, AND PATRIOT OUTDOOR, LLC,

Petitioners,

v.

VIACOM OUTDOOR INC., WALLY KELLY AND HAROLD GUSTIN

Respondents.

On Petition for Writ of Certiorari To The United States Court of Appeals For the Eighth Circuit

BRIEF IN OPPOSITION OF WALLY KELLY AND HAROLD GUSTIN

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QUESTIONS PRESENTED

1. [Not Applicable to Respondents Kelly and Gustin]

2. Whether the Eighth Circuit erred in reversing the RICO judgments against Respondents Kelly and Gustin based upon its determination that Petitioners "failed to produce sufficient evidence of RICO violations by Kelly and Gustin?" *See* Pet. App. at 45a.

3. [Not Applicable to Respondents Kelly and Gustin]

TABLE OF CONTENTS

QUESTIONS PRESENTED i
TABLE OF CONTENTS ii
TABLE OF AUTHORITIES iv
INTRODUCTION 1
STATEMENT OF THE CASE 4
I. Procedural background 4
II. Factual background. 5
SUMMARY OF ARGUMENT 11
REASONS FOR DENYING THE PETITION AS TO RESPONDENTS KELLY AND GUSTIN 13
I. The Eighth Circuit's determination that Petitioners failed to prove a standard element of a RICO claim against Respondents Kelly and Gustin is legally sound and does not present any "compelling reason" for granting a petition for certiorari under Supreme Court Rule 10. . 13
A. Rule 10(a) does not apply to Question 2... 14
1. Question 2 does not involve a conflict with other federal circuit courts. 14
2. Question 2 does not involve a conflict with a state court of last resort. 15
3. Question 2 does not involve any departure from "the accepted and usual course of judicial proceedings." 15

B. Rule 10(c) does not apply to Question 2. ... 16

1. Question 2 does not involve an important, unresolved point of federal law that this Court must settle. ... 16

2. Question 2 does not involve a conflict with this Court. ... 16

C. Rule 10 discourages petitions that merely allege fact-based errors that are bereft of any compelling federal legal issues, such as the error Petitioners allege in Question 2. 18

II. The Eighth Circuit correctly applied settled law regarding the elements of RICO. ... 19

A. Issues that Petitioners do not challenge. .. 19

B. Petitioners mischaracterize the Eighth Circuit's opinion and the evidence. ... 22

III. The Eighth Circuit decided this case on "continuity"; but there were other dispositive flaws in the Petitioners' RICO claims that the Eighth Circuit did not reach. ... 24

A. There was no evidence that Kelly and Gustin intentionally devised a "scheme to defraud." ... 24

B. Petitioners lack standing under RICO because they were not "injured in their business or property." ... 25

C. Petitioners failed to prove factual or proximate cause. ... 26

CONCLUSION ... 27

TABLE OF AUTHORITIES

Cases

Anza v. Ideal Steel Supply Corp., 126 S. Ct. 1991 (2006) 26
Belk v. City of Eldon, 228 F.3d 872, 878 (8th Cir. 2000), *cert. denied*, 532 U.S. 1008, 121 S.Ct. 1734, 149 L.Ed.2d 659 (2001) 19-20
Bridge v. Phoenix Bond & Indem. Co., 128 S. Ct. 2131 (2008) 17, 18, 25
Brown v. Fred's, Inc., 494 F.3d 736, 740 (8th Cir. 2007) 20
H.J. Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989) ..... *passim*
Hughes v. Consol.-Penn. Coal Co., 945 F.2d 594, 611 (3d Cir. 1991) 23
Jackson v. BellSouth Telecomm, 372 F.3d 1250, 1266 (11th Cir. 2004) 23
Nat'l Farmers Union Std. Ins. Co. v. Souris River Tel. Mut. Aid Coop., 75 F.3d 1268, 1273 (8th Cir. 1996) 19
Primary Care Investors, Seven, Inc. v. PHP Healthcare Corp., 986 F.2d 1208, 1215-16 (8th Cir. 1993) 23

Statutes

18 U.S.C. §§ 1961 *et seq.* 1, 4
18 U.S.C. § 1962(c) 4, 19
18 U.S.C. § 1964(c) 25

Rules

FED. R. CIV. P. 50 ..... 15, 18, 20, 21
FED. R. CIV. P. 50(a) 4
FED. R. CIV. P. 50(b) 5
SUP. CT. R. 10 ..... *passim*

RESPONDENTS WALLY KELLY AND HAROLD GUSTIN'S BRIEF IN OPPOSITION

INTRODUCTION

Wally Kelly and Harold Gustin oppose the petition for writ of certiorari to the United States Court of Appeals for the Eighth Circuit. Petitioners are three local outdoor advertising companies (Craig Outdoor Advertising, Inc. ("Craig"), Midwest Outdoor Media, LLC ("Midwest"), and Patriot Outdoor, LLC ("Patriot")) and a former shareholder of another such company (Curtis Massood). Respondents are a national outdoor advertising company (Viacom Outdoor Inc. ("Viacom")) and two individual senior management employees (Kelly and Gustin). The petition raises three separate questions, each involving different parties and claims.

This Response By Kelly and Gustin

Question 2 is the only question that pertains to Kelly and Gustin, and therefore it is the only question addressed in this response.

In Question 2, Petitioners Craig, Midwest and Patriot challenge the Eighth Circuit's decision to reverse civil judgments under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.*, against Kelly and Gustin because of the lack of evidence of "continuity" required to satisfy the "pattern of racketeering activity" element of RICO. Significantly, Petitioners do not contend that the Eighth Circuit's decision as to Kelly and Gustin is in conflict with any other circuit court, that the Eighth Circuit misstated the

law concerning RICO "continuity," or that the law is unsettled.

Instead, Petitioners attempt to buttress a request for this Court to second-guess the Eighth Circuit's determinations concerning the sufficiency of the evidence of RICO "continuity" under the complicated facts of this particular case, with unfounded accusations that the Eighth Circuit's decision in favor of Kelly and Gustin could only be the result of judicial "hostility" to RICO.

Question 2 does not satisfy any of the reasons that justify this Court's review, nor do Petitioners offer any other "compelling reason" for looking behind the Eighth Circuit's ruling on this matter when there is no disputed point of law.

Questions 1 and 3 are addressed to Viacom

This petition clearly indicates that Questions 1 and 3 are addressed only to Viacom, and they involve issues unrelated to RICO's pattern and continuity requirements.

Question 1 involves Petitioners and Respondent Viacom. Petitioners in that question challenge the Eighth Circuit's decision affirming summary judgment on the civil RICO claims alleged against Viacom. Those claims employed an association-in-fact RICO "enterprise" theory because under established RICO principles Petitioners could not name Viacom as the RICO "enterprise" and sue it as a RICO defendant. After the association-in-fact RICO claims were dismissed, the district court allowed the primary RICO claims naming Viacom as the RICO "enterprise" to proceed against Kelly and Gustin, and two other employees who obtained

defense verdicts. The claims against Kelly and Gustin were reversed by the Eighth Circuit for lack of evidence of "continuity," without regard to the issue of "enterprise." Pet. App. 42a-45a.

Question 3 pertains only to Petitioner Massood and Respondent Viacom. In that claim, Massood asks this Court to review the Eighth Circuit's decision affirming dismissal of his alleged state law and civil RICO derivative action claims that he attempted to bring against Viacom on behalf of a company he sold and thus had no ownership interest in. The Eighth Circuit noted that Massood was aware of the facts underlying his alleged claims before selling his interest in the company. Pet. App. 49a-50a, n.11. The events underlying Massood's claims took place years before either Kelly or Gustin had any involvement in Viacom's railroad right-of-way billboard site licensing.

Neither the merits of Question 2 nor whether it is worthy of this Court's review depend in any way on this Court's decision whether to consider Questions 1 or 3, and the Petitioners have shown no "compelling reason" for this Court to grant review on Question 2. Accordingly, Respondents Kelly and Gustin respectfully request that the petition be denied as to them.

STATEMENT OF THE CASE

I. Procedural background.

Three local billboard companies and a former shareholder of a fourth company brought this lawsuit in 2004 in the Western District of Missouri seeking damages arising out of their applications to Viacom (or one of its predecessors) proposing new billboard sites on railroad property. The plaintiffs claimed that Viacom's employees fraudulently induced them to apply for proposed billboard locations by allegedly representing that Viacom would process their applications on a "first-come, first-served" basis.

Based upon these allegations, the plaintiffs attempted to assert several state law claims (fraud, tortious interference, and unfair competition), and claims under the federal Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961 *et seq.*, against Viacom and several of its current and former employees, including Kelly and Gustin. Prior to trial, the district court dismissed plaintiff Massood's claims for lack of standing and granted summary judgment on the RICO claims against Viacom. Pet. App. 53a-55a, 62a-66a.

At trial, the three remaining plaintiffs elected to present their state law claims against only Viacom, and limited their claims against the individual defendants to RICO claims under 18 U.S.C. § 1962(c), based upon alleged predicate acts of mail and wire fraud. Appellants' Joint Appendix ("AJA") 1550-1608. At the close of the evidence, the district court denied the defendants' Rule 50(a) motion for judgment as a matter of law. *Id.* at 1519-42; Trial

Tr. 2088-2131. The jury returned defense verdicts for two individual Viacom employees (Randall Romig and Randy Jackson), but returned verdicts in favor of the remaining plaintiffs on their state law claims against Viacom and their RICO claims against Viacom executives Kelly and Gustin. AJA 1721-28. Defendants' renewed motion for judgment as a matter of law under Rule 50(b) was also denied. *Id.* at 1729-61, 2013-16.

On appeal, the Eighth Circuit held the trial court erred in denying Kelly and Gustin's motion for judgment as a matter of law because Petitioners failed to present sufficient evidence to support the "continuity" component of a RICO "pattern of racketeering activity" against Kelly and Gustin. Pet. App. 42a-45a.

The Petitioners disagree with the Eighth Circuit's determination regarding the sufficiency of the evidence on RICO continuity, and this disagreement is the basis for Question 2 of their petition.[1]

II. Factual background.

Viacom was formed as a new company near the end of 2001 when its parent company merged the operations of two outdoor advertising subsidiaries: Outdoor Systems, Inc. ("Outdoor") and Transportation Displays Inc. ("TDI"). Trial Tr. 1380-81. Wally Kelly had worked for Outdoor since it was founded as a small independent billboard company in 1984. *Id.* at 1327, 1376. Gustin had worked for

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[1] As explained below, Kelly and Gustin had numerous other grounds for reversal which the Eighth Circuit did not reach.

TDI since 1989. *Id.* at 777. The parent company asked Kelly to serve as the president of the new Viacom and to oversee the integration of Outdoor and TDI. *Id.* at 1381.

Outdoor's primary business was selling advertising on billboards on property it owned or leased. *Id.* at 1348, 1383-84, 1412. TDI's primary business was transit system advertising, *e.g.*, on buses and commuter trains. *Id.* at 778-79.

Prior to their consolidation, TDI and Outdoor had entered into a number of agreements with railroads that gave them exclusive easement and licensing rights on railroad property that they could use for themselves or lease or license to others for the purpose of constructing and operating billboards. *Id.* at 777-80, 982-83; Compendium of Trial Exs. ("Trial Exs.") 1019-1059, 1229-1309. On consolidation, Viacom succeeded to TDI and Outdoors' rights under these railroad agreements. Trial Tx. 1379.

Kelly's experience and responsibilities at Outdoor had been in sales of advertising space. He had not been involved with billboard site leasing and acquisitions on railroad property or otherwise. Kelly also had no involvement in TDI prior to the formation of Viacom in late 2001. *Id.* at 1384.

Gustin had been a Senior Vice-President at TDI, and had been involved in negotiating some of TDI's contracts with railroads. *Id.* at 777. In his role, Gustin typically did not interact with billboard site applicants; TDI's field personnel dealt with applicants. *Id.* at 784.

As part of the integration of Outdoor and TDI, Kelly combined the two railroad licensing programs

into a "Landlease" group. Gustin became Viacom's Vice-President of Landlease. *Id.* at 1348-51.

During January 2002, Kelly hosted introductory meetings with various newly-combined departments of Viacom. Kelly held such a meeting for the new Landlease group on January 29, 2002. *Id.* at 1382-87.

Petitioners claim that it was at this 30-40 minute meeting – Kelly's only meeting with the Landlease group – that Kelly unveiled an alleged "scheme to defraud" other billboard companies who wanted to apply for sites on railroad property under Viacom's control. But the unrebutted evidence at trial was that Kelly simply directed that any applications received should be reviewed by Viacom to determine whether it was in Viacom's best interest to enter into a license agreement for the proposed site with the applicant. *Id.* at 1344-46, 1387-88. Kelly explained:

> Everybody in the meeting believed . . . that . . . we had the exclusive rights to these easements and that an application was just a mere process. It certainly wasn't a contract or in any way, shape or form an entitlement of any billboard company to submit to us and immediately feel they were going to be given a board.

Id. at 1361.

Significantly, the Petitioners do not claim that they had any actual entitlement to license the sites they proposed, or that the review process that Kelly instituted was itself illegitimate. *Id.* at 462-63. Petitioners do not dispute the Eighth Circuit's description of their RICO claim, as follows:

> Plaintiffs' RICO theory is that Kelly and Gustin, individually, through the use of the mails and wires, devised and perpetrated a scheme by which Viacom would profess to follow a first-come, first-served procedure – thereby fraudulently inducing Plaintiffs to submit applications – but would secretly review railroad billboard site applications with the goal of appropriating desired sites for its own use. In other words, the culpable act was using the mails and wires to conceal or misrepresent the review process; it was not the review process itself.

Pet. App. at 44a.

The unrebutted testimony of every person present at the January 2002 meeting confirmed that there was no discussion whatsoever about what applicants should or should not be told about the review process or any other matter. Trial Tx. 180-81, 783-84, 1176, 1355-56, 1472, 1750, 1823. There was no evidence at trial that either Kelly or Gustin ever suggested or directed that Viacom employees should conceal or misrepresent to anyone Viacom's review of billboard site applications. In fact, Kelly never had any contact or communication with any applicants, and each of the plaintiffs testified that Kelly had made no misrepresentations or deceived them. *Id.* at 513, 684, 1401, 1678-79 Nor did he know what they were told. *Id.* at 1362-63, 1398-99. Although Gustin had some limited contact with applicants, these communications occurred almost exclusively after the applicants had already submitted their applications.

The Eighth Circuit, however, did not reach the issue of whether there was any evidence that Kelly or Gustin in fact devised or participated in a fraudulent scheme, whether they in fact committed any particular predicate act of mail or wire fraud, whether there was scienter, or whether any act of Kelly and Gustin was the proximate cause of any injury to business or property suffered by any plaintiff. Instead, the Eighth Circuit "focus[ed] on whether, assuming for the sake of argument that Kelly and Gustin engaged in the predicate acts of mail and wire fraud as alleged, Plaintiffs' evidence was sufficient to establish that those predicate acts can be said to form a pattern of racketeering activity." Pet. App. at 43a. The Eighth circuit concluded that the evidence was insufficient as a matter of law.

In reviewing the sufficiency of the evidence as to RICO's "pattern of racketeering activity" element, the Eighth Circuit correctly quoted and relied exclusively on this Court's seminal opinion on that issue:

> In *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 229, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989), the Supreme Court observed that "to prove a pattern of racketeering activity a plaintiff . . . must show that the racketeering predicates are related, *and* that they amount to or pose a threat of continued criminal activity." Continuity in this context refers "either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition." *Id.* at 241. To satisfy the RICO continuity

> element, therefore, a plaintiff must provide evidence of multiple predicate acts occurring over a substantial period of time (closed-end continuity) or evidence the alleged predicate acts threaten to extend into the future (open-ended continuity). *Id.* at 242. A plaintiff may establish open-ended continuity by showing that the predicate acts themselves involve a distinct threat of long-term racketeering activity or that the predicate acts constitute a regular way of conducting an ongoing legitimate business or a RICO enterprise. *Id.* at 242-43.

Pet. App. at 43a-44a. Citing the jury instructions in this case, the Eighth Circuit pointed out that:

> [T]he only theory advanced by Plaintiffs with respect to the continuity element was a theory of open-ended continuity. . . . Accordingly, Plaintiffs were required to show that the predicate acts of mail fraud and wire fraud committed by Kelly and Gustin "project[ed] into the future with a threat of repetition." *H.J. Inc.*, 492 U.S. at 241.

Pet. App. at 44a.

Applying the established law of RICO "continuity" to the facts of this case, the Eighth Circuit concluded that the evidence did not support the RICO theory Petitioners had asserted against Kelly and Gustin:

> In January 2003, however, Viacom began routinely transmitting a standard form letter to all site applicants notifying them that their applications were subject to review by Viacom.

> At that time, Viacom effectively terminated any allegedly fraudulent scheme Kelly and Gustin conducted by expressly notifying site applicants that Viacom would review all applications for billboard licenses and rule on each application in its discretion. Because there was no evidence that the review process would continue to be concealed or misrepresented by Kelly, Gustin, or any other Viacom employee in the future, Plaintiffs' theory of RICO continuity, and thus their RICO claims against Kelly and Gustin, must fail.

Id. at 44a-45a. Accordingly, the Eighth Circuit reversed the RICO judgments against Kelly and Gustin on this basis.

SUMMARY OF ARGUMENT

Question 2 is the only issue that pertains to Respondents Kelly and Gustin. In that question, Petitioners ask this Court to review the Eighth Circuit's unremarkable ruling that the evidence was legally insufficient to establish the required "continuity" element of RICO on their claims against Kelly and Gustin. This question does not involve any of the reasons this Court traditionally considers for granting a petition, such as a split among the circuits or an unsettled point of federal law. Rather it falls squarely within the category of issues that Supreme Court Rule 10 cautions against: an asserted error that, at most, "consists of erroneous factual findings or the misapplication of a properly stated rule of law."

While Petitioners attempt to "dress-up" their petition by characterizing the Eighth Circuit's decision with regard to Kelly and Gustin as improperly "narrowing RICO," the fact is that Petitioners do not contest the correctness of *any* of the Eighth Circuit's statements of the law on this question. The Eighth Circuit explicitly set out this Court's basic instructions regarding the "continuity" component of a "pattern of racketeering activity" in *H.J. Inc.*, and correctly applied those rules to determine whether the evidence of "continuity" was sufficient as a matter of law. The Eighth Circuit carefully examined the extensive record in this case and followed the proper standard of review. Although Petitioners contest the outcome, there is no "compelling reason" for further review.

In addition to the lack of "continuity," Kelly and Gustin identified other critical defects in Petitioners' RICO claims against them on appeal – such as lack of intent, the absence of injury to "business or property," and the failure to show proximate cause – which the Eighth Circuit did not find necessary to address because the "continuity" issue was dispositive. These other deficiencies likewise weigh against granting review as to Question 2, which does not present an issue of importance beyond the parties and circumstances of this particular case.

REASONS FOR DENYING THE PETITION AS TO RESPONDENTS KELLY AND GUSTIN

I. The Eighth Circuit's determination that Petitioners failed to prove a standard element of a RICO claim against Respondents Kelly and Gustin is legally sound and does not present any "compelling reason" for granting a petition for certiorari under Supreme Court Rule 10.

Petitioners challenge the Eighth Circuit's decision reversing civil RICO judgments against these two individuals solely because they disagree with that Court's conclusion that there was insufficient evidence, in this particular case, to establish that each individual engaged in a "pattern of racketeering activities." Rather than involving any dispute about the law, this question concerns nothing more than Petitioners' disagreement with the Court of Appeals about the significance of certain evidence to the specific claims arising out of the unusual circumstances of this particular case. Consequently, Petitioners have not identified any "compelling reason" for this Court to reassess the Eighth Circuit's conclusions, which were based upon its thorough review and careful analysis of the voluminous record in this case.

The specific considerations identified in Supreme Court Rule 10(a)-(c), while not exhaustive, "indicate the character of the reasons the Court considers" in selecting questions for review. SUP. CT. R. 10. This Court should deny review of Petitioners' Question 2, because it does not fall within any of the considerations listed in Rule 10(a)-(c), nor does it

present the kind of broad-based issues that would be of any appreciable significance beyond the parties to this case. The Eighth Circuit's ruling was a routine, fact-based application of long-established, widely accepted principles to a specific case and does not merit this Court's review.

A. Rule 10(a) does not apply to Question 2.

1. Question 2 does not involve a conflict with other federal circuit courts.

Petitioners make no claim that the Eighth Circuit's decision concerning RICO's "continuity" element is "in conflict with the decision of another United States court of appeals on the same important matter." SUP. CT. R. 10(a). In the section of their petition addressing Question 2, Petitioners do not even refer to or cite any circuit court opinion other than the Eighth Circuit's opinion in this case (except to note the Eighth Circuit's citation to a 2007 Eighth Circuit opinion). Indeed, the Eighth Circuit conducted a straightforward analysis of the "continuity" issue in this case under this Court's primary authority on that issue, *H.J. Inc.*, without needing to refer to sister circuit or lower court authority. Moreover, the Eighth Circuit's decision cannot be in conflict with another court of appeals "on the same important matter," since the Eighth Circuit's decision was about the significance and sufficiency of the evidence in this specific case, and not on a principle of law on which there is any conflict among the circuits.

2. Question 2 does not involve a conflict with a state court of last resort.

Petitioners also do not claim that, in rejecting the RICO claims due to the failure of proof of "continuity," the Eighth Circuit "decided an important federal question in a way that conflicts with a decision by a state court of last resort." SUP. CT. R. 10(a).[2] Question 2 does not involve any issue of state law. The question here is simply a federal question of whether Petitioners proved every element of a unique federal claim in a case in which the law regarding those elements is undisputed.

3. Question 2 does not involve any departure from "the accepted and usual course of judicial proceedings."

The final reason for review of a court of appeals' decision identified in Rule 10(a) that this Court considers potentially "compelling" is when the court of appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." SUP. CT. R. 10(a). Petitioners do not assert that the Eighth Circuit has departed in any way from the "accepted and usual course of judicial proceedings."

The Eighth Circuit made decisions on the sufficiency of the evidence under FED. R. CIV. P. 50 and resolved most of them in the Petitioners' favor on numerous state law issues. The fact that, as to the RICO claims, the Eighth Circuit also found that the Petitioners failed to meet FED. R. CIV. P. 50's

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[2] Similarly, Supreme Court Rule 10(b) does not apply here, because it pertains only to a petition challenging the decision of a state court of last resort.

standard on the "continuity" requirement exhibits no deviation from established procedure or authority. The Eighth Circuit did nothing to warrant an exercise of this Court's supervisory authority.

B. Rule 10(c) does not apply to Question 2.

1. Question 2 does not involve an important, unresolved point of federal law that this Court must settle.

Petitioners do not claim that, in reviewing the evidence concerning the "continuity" element of RICO in this case, the Eighth Circuit was confronted with an important issue of federal law "that has not been, but should be, settled by this Court." SUP. CT. R. 10(c). This Court in *H.J. Inc. v. Northwestern Bell Telephone Co.*, 492 U.S. 299 (1989), held that "continuity" is an essential component of a "pattern of racketeering activity" necessary to state a RICO claim, and established the two prevailing concepts of "closed-ended" and "open-ended" continuity. Petitioners do not claim that the Eighth Circuit failed to correctly identify and state the principles concerning "continuity" established in *H.J. Inc.*, which the Eighth Circuit explicitly quoted and cited, nor do they contend that those principles are unsettled. Question 2 does not involve any unresolved point of federal law.

2. Question 2 does not involve a conflict with this Court.

Petitioners do not contend that the Eighth Circuit's decision conflicts with this Court's decision in *H.J. Inc.*, which is the relevant decision of this Court concerning RICO's "continuity" element. Instead, Petitioners attempt to invent a conflict

between the Eighth Circuit's decision in this case and this Court's opinion in *Bridge v. Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131 (2008), issued five days later.

In *Bridge*, this Court held that first-party reliance on a defendant's alleged misrepresentations is not an essential element of a RICO claim predicated on mail fraud. *Id.* at 2134. In the Kelly and Gustin case, however, the Eighth Circuit did not rule on the issue of reliance with regard to the RICO claims. The "continuity" element was not at issue in *Bridge* and was not even discussed in that case.

Nevertheless, Petitioners point to the Eighth Circuit's passing dicta at the end of its RICO "continuity" discussion, where the Eighth Circuit noted: "We have in the past rejected attempts to convert ordinary civil disputes into RICO cases." Pet. App. 45a. Petitioners inaccurately characterize this comment as the basis for the Eighth Circuit's decision, and seek to equate it with an argument this Court rejected in *Bridge*, that a "first-party reliance" requirement should be added to civil RICO "in order to avoid 'over-federalization' of traditional state-law claims." Petitioners then unjustifiably assert that the Eighth Circuit acted in "open defiance of controlling authority" and "rebell[ed] against this Court's often repeated instruction that RICO cannot be narrowed based on judicial hostility." Pet. 19. Petitioners' pejorative language and heavy reliance upon the Eighth Circuit's obvious dicta expose the weakness of their claim.

Bridge is neither controlling authority, nor does the Eighth Circuit's discussion conflict with *Bridge*.

In this case, the Eighth Circuit was indisputably correct in observing that RICO claims have additional requirements – such as "continuity," pattern, and enterprise – not found in ordinary civil disputes, and Petitioners do not claim otherwise. The Eighth Circuit properly pointed out this distinction here, where it allowed state law claims (including common law fraud) against Viacom to stand but determined that the evidence did not establish the requisite "continuity" to state a RICO claim against Kelly and Gustin.

This Court's opinion in *Bridge* was concerned with quite the opposite – whether lower courts were imposing additional requirements on RICO claims that are not contained in the RICO statute or recognized by this Court. Thus, no conflict exists between the Eighth Circuit's decision and a decision of this Court.

C. Rule 10 discourages petitions that merely allege fact-based errors that are bereft of any compelling federal legal issues, such as the error Petitioners allege in Question 2.

Rule 10 concludes: "A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." SUP. CT. R. 10. Petitioners' Question 2 is precisely the kind of issue that Rule 10 seeks to discourage.

The Eighth Circuit determined, after an exhaustive review of an extensive record, that the District Court erred in failing to grant judgment as a matter of law under FED. R. CIV. P. 50 on the RICO claims against Kelly and Gustin because the jury did

not have a legally sufficient evidentiary basis to find that they had engaged in the pattern of racketeering activity required under 18 U.S.C. § 1962(c).

The alleged error asserted by Petitioners is, again, nothing but a disagreement with the Eighth Circuit's conclusions concerning the sufficiency of the factual evidence. Accordingly, Question 2 does not present an issue that would be of significance beyond this case, and does not merit this Court's review.

II. The Eighth Circuit correctly applied settled law regarding the elements of RICO.

A. Issues that Petitioners do not challenge.

Petitioners do not challenge a single point of law stated by the Eighth Circuit in its review of the RICO claims against Kelly and Gustin. The Eighth Circuit did not give these issues short shrift, but gave a detailed and correct statement of the legal issues essential to its holding on these claims.

First, the Petitioners do not claim that the Eighth Circuit failed to identify the proper standard of appellate review as to these claims. The Eighth Circuit stated those standards as follows:

> We review a district court's denial of a motion for judgment as a matter of law de novo, applying the same standards as the district court. *Nat'l Farmers Union Std. Ins. Co. v. Souris River Tel. Mut. Aid Coop.*, 75 F.3d 1268, 1273 (8th Cir. 1996). Judgment as a matter of law following a jury verdict is appropriate only when "the evidence is entirely insufficient to support the verdict." *Belk v. City of Eldon*, 228

> F.3d 872, 878 (8th Cir. 2000), *cert. denied*, 532 U.S. 1008, 121 S.Ct. 1734, 149 L.Ed.2d 659 (2001). In conducting our review, we consider the evidence in the light most favorable to the nonmoving party, here the Plaintiffs, giving that party the benefit of all favorable inferences that can reasonably be drawn from the evidence. *See Brown v. Fred's, Inc.*, 494 F.3d 736, 740 (8th Cir. 2007).

Pet. App. at 42a. Petitioners nowhere contend that the Eighth Circuit misidentified or misstated the appropriate standard of review under FED. R. CIV. P. 50, which it explicitly applied here. Although Petitioners argue that the Eighth Circuit "substituted its interpretation" of the evidence for that of the jury and "gave no deference" to the jury's verdict, the fact that the Eighth Circuit reversed the judgment does not mean that it give the verdict "no deference." Indeed, the Eighth Circuit's detailed opinion demonstrates that it repeatedly showed deference to the jury's verdict. FED. R. CIV. P. 50 does not require a court to give *absolute* deference to the jury verdict; otherwise there would be no review. As an appellate court, it was the Eighth Circuit's role to review the evidence and determine, as a matter of law, whether the evidence met the threshold of proof necessary to establish every element of Petitioners' claims.

Second, Petitioners do not claim that the Eighth Circuit failed to properly set out the standard elements required for a civil RICO claim. *See* Pet. App. 42a-43a. Specifically, Petitioners do not contest the Eighth Circuit's holdings that the essential elements of a RICO violation, including engaging in

a pattern of racketeering activity, must be established as to each individual defendant, and that the "[f]ailure to present sufficient evidence on any one element of a RICO claim means the entire claim fails." *Id.*

Third, Petitioners do not claim that the Eighth Circuit failed, in any way, to correctly outline and apply this Court's explanation of the specific issue of RICO "continuity" in *H.J. Inc.* *Id.* at 43a-44a. Specifically, Petitioners do not dispute or challenge "continuity" as an essential component of proof of a RICO "pattern of racketeering activity," that Petitioners only advanced "open-ended continuity," the Eighth Circuit's statement and application of the legal requirement of "open-ended continuity," or what the Eighth Circuit said the Petitioners had to prove to meet these requirements.

Finally, Petitioners do not contest the Eighth Circuit's determination that the alleged "culpable act" on which the RICO claims depended was "using the mails and wires to conceal or misrepresent the review process; it was not the process itself. *See* Pet. App. 44a. The Eighth Circuit correctly identified the crux of Petitioners' RICO theory against Kelly and Gustin, which Petitioners also do not challenge.

In sum, Question 2 does not involve any genuine dispute regarding the correctness of the Eighth Circuit's statement of the law and issues as to Petitioners' RICO claims against Kelly and Gustin. Instead, the issue is the Eighth Circuit's determination regarding the legal sufficiency of the evidence in this case, again a task that FED. R. CIV. P. 50 requires the Eighth Circuit to perform.

B. Petitioners mischaracterize the Eighth Circuit's opinion and the evidence.

In an effort to create a reviewable issue where there is none, Petitioners mischaracterize both the Eighth Circuit' opinion and the evidence. Petitioners unfairly claim that the Eighth Circuit is "hostile" to RICO claims and ruled against Petitioners in a surreptitious effort to "undermine" RICO in the manner of a "Trojan Horse" and "narrow" its scope.

The Eighth Circuit did nothing of the sort. It correctly applied *H.J. Inc.* in just the way this Court specified. In *H.J. Inc.*, this Court expressly recognized the continuity requirement as a concept that Congress intended to distinguish the conduct targeted by RICO from isolated or short-term activity:

> [W]e have concluded . . . that when Congress said predicates must demonstrate "continuity" before they may form a RICO pattern, it expressed an intent that RICO reach activities that amount to or threaten long-term criminal activity.

492 U.S. at 243 n.4.

The Court in *H.J. Inc.* stated that to establish open-ended continuity the plaintiffs must prove "past conduct that by its nature projects into the future with a threat of repetition." *Id.* at 241. The Court in *H.J.* further acknowledged the highly fact-bound character of the inquiry: "Whether the predicates proved establish a threat of continued racketeering activity depends on the specific facts of each case." *Id.* at 242.

Far from usurping the jury's function, the Eighth Circuit properly engaged in the application of *H.J. Inc.'s* RICO "continuity" standard to the "specific facts of each case" as part of the judicial process through which the concept of "continuity" is to be measured and assessed. *Id.*

Petitioners also mischaracterize the evidence upon which the Eighth Circuit relied in concluding that "open-ended continuity" did not exist. Petitioners are incorrect in asserting that the January 2003 letter could only terminate the allegedly "fraudulent scheme" if it "actually revealed that Viacom would take the good sites for itself, thereby nullifying the fraud." As recognized by the Eighth Circuit, the January 2003 letter terminated any allegedly fraudulent scheme by advising applicants of Viacom's review process. Viacom thereby put applicants on notice, less than a year after the alleged scheme had begun,[3] that an applicant – even if first to apply – was by no means entitled to receive a license to a site.

The Eighth Circuit ruled that the disclosure of a review process in the January 2003 letter and Viacom's role in it was legally sufficient to terminate

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[3] The Eighth Circuit found, and Petitioners do not dispute, that Petitioners did not attempt to meet the "pattern of racketeering activity" requirement by proving "closed-end continuity." Pet. App. at 44a. In any case, courts generally agree that evidence of predicate acts over a period less than one year is insufficient to satisfy "closed-end continuity." *See, e.g., Jackson v. BellSouth Telecomm*, 372 F.3d 1250, 1266 (11th Cir. 2004); *Cofacredit v. Windsor Plumbing Supply Co.*, 187 F.3d 229, 242 (2d Cir. 1999); *Hughes v. Consol.-Penn. Coal Co.*, 945 F.2d 594, 611 (3d Cir. 1991); *Primary Care Investors, Seven, Inc. v. PHP Healthcare Corp.*, 986 F.2d 1208, 1215-16 (8th Cir. 1993).

any alleged scheme. Given the position advanced by the Petitioners themselves at trial that the failure to disclose the review process itself constituted the alleged fraud under RICO, the Eighth Circuit was correct in that conclusion.

III. The Eighth Circuit decided this case on "continuity"; but there were other dispositive flaws in the Petitioners' RICO claims that the Eighth Circuit did not reach.

Question 2 would also not provide an effective vehicle for review on certiorari because the RICO claims were fatally flawed in other ways as well. Having concluded that the evidence was insufficient as to "continuity," the Eighth Circuit simply did not reach these other issues that Kelly and Gustin raised on appeal.

A. There was no evidence that Kelly and Gustin intentionally devised a "scheme to defraud."

There was literally zero evidence that Kelly or Gustin, both corporate executives, suggested or directed Viacom employees to mislead or conceal the review process or that they were even aware that any applicants were being misled. The evidence established that Kelly had no contact or communication with any of the Petitioners or other applicants, and there is no evidence that Kelly or Gustin ever concealed or made any misrepresentations to Petitioners to induce them to apply for billboard sites.

There was thus no evidence that Kelly or Gustin intentionally devised or participated in a "scheme to defraud," which is an essential element of the RICO

predicate act of mail fraud. *See Bridge*, 128 S. Ct. at 2138 ("The gravamen of the offense [of mail fraud] is the scheme to defraud").

Even if other employees of Viacom misled or concealed the review process, there is no basis under RICO for holding Kelly and Gustin vicariously liable for the acts of Viacom or its other employees.

B. Petitioners lack standing under RICO because they were not "injured in their business or property."

As disappointed applicants proposing to engage in negotiated transactions with private parties, Petitioners were not "injured in their business or property" under 18 U.S.C. § 1964(c) by not being granted licenses on a first-come, first-served basis. Petitioners do not claim that the mere unilateral act of submitting an unsolicited application to a private party in commerce created a legal entitlement to obtain a license to a billboard site, or that Viacom was obligated to grant such a license, simply because they applied. Petitioners also did not claim or present any evidence at trial of any expense incurred in identifying possible sites on railroad property, which admittedly was based entirely upon publicly available information. Moreover, the Petitioners were not injured in their business or property by their disclosure of potential sites to Viacom, since Petitioners would in any case have to disclose the sites to Viacom in order to apply even after Viacom's review process is fully disclosed, and Petitioners would have no more or less entitlement to a license agreement.

C. Petitioners failed to prove factual or proximate cause.

Finally, Petitioners failed to prove that Kelly or Gustin committed any RICO predicate act of mail or wire fraud that was the "but-for" or proximate cause of Petitioners' alleged injuries under *Anza v. Ideal Steel Supply Corp.*, 126 S. Ct. 1991 (2006). In *Anza*, this Court held that a RICO claim requires proof of a "direct causal connection" between the defendant's alleged RICO violation and the alleged injury.

Petitioners' proof of proximate cause was deficient in several ways. According to the Petitioners' RICO theory, it was the alleged misrepresentation or concealment of the review process, not the review process itself, that constituted the alleged fraudulent scheme. But the Petitioners cannot show that they would have obtained the sites they proposed if the review process had been disclosed. Petitioners also did not present evidence that owners of neighboring property would have been willing to lease or license that property to them if they had not applied to Viacom. In addition, several of the specific proposed sites had other proximate cause problems, including the fact that some applications were submitted prior to the institution of the review process, evidence that the railroads refused to process some applications, and admitted zoning problems.

These additional deficiencies in Petitioners' RICO claims against Kelly and Gustin, which the Eighth Circuit did not reach due to its dispositive determination as to RICO "continuity," further show why this case does not merit this Court's review.

CONCLUSION

For the reasons stated above, Respondents Kelly and Gustin respectfully request that this Court deny the petition for writ of certiorari.

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115

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IN THE

Supreme Court of the United States

CRAIG OUTDOOR ADVERTISING, INC., CURTIS MASSOOD, MIDWEST OUTDOOR MEDIA, LLC, AND PATRIOT OUTDOOR, LLC, PETITIONERS

v.

VIACOM OUTDOOR INC., WALLY KELLY AND HAROLD GUSTIN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

THE PETITION SHOULD BE GRANTED 1

I. The District Court and the Eighth Circuit Both Redrafted the RICO Statute's "Enterprise" Requirement; the Courts' Respective Determinations Constitute Pure Legal Errors in Conflict with this Court's Precedent 1

II. The Eighth Circuit's Decision Creates a Clear Circuit Split 6

III. The Eighth Circuit Usurped the Jury's Fact-Finding Role and Ignored Key Evidence the Jury Relied Upon because of the Court of Appeals' Open Hostility to RICO 9

IV. Equitable Standing Is Required to Uphold the Broad Remedial Protections of RICO 12

CONCLUSION 12

TABLE OF AUTHORITIES

Page

CASES

Baker v. IBP, Inc., 357 F.3d 685 (7th Cir. 2004) 8
Bridge v. Phoenix Bond & Indem. Co., 128 S. Ct. 2131, 2145 (2008) 11
Galloway v. United States, 319 U.S. 372, 395 (1943) 10
Miller v. Steinbach, 268 F. Supp. 255, 267 (S.D.N.Y. 1967) 12
United States v. Orena, 32 F.3d 704 (2d Cir. 1994) 6, 9
United States v. Turkette, 452 U.S. 576, 583 (1981) 3, 4, 5, 6
Williams v. Mohawk Industries, Inc., 465 F.3d 1277 (11th Cir. 2005) 6, 7, 8

STATUTES

18 U.S.C. § 1961(4) 4
18 U.S.C. § 1962 4

RULES

Supreme Court Rule 33.1(d) 14
Supreme Court Rule 33.1(h) 14

THE PETITION SHOULD BE GRANTED

The response of Viacom Outdoor, Inc. ("Viacom") makes inaccurate and misleading statements regarding the district court's holdings, misrepresents the Eighth Circuit's analysis of the association-in-fact enterprise, and ignores the critical holdings of this Court's prior decisions. It also whitewashes the gaping circuit split the Eighth Circuit created and does not discuss the Eighth Circuit's remarkable substitution of its own results-driven fact-finding for the jury's verdict. The response offered by Gustin and Kelly defends the Court of Appeals' fact-finding, but urges this Court to overlook it. This Court should grant the petition to correct the Eighth Circuit's rewriting of the RICO statute's "enterprise" requirement, to resolve the circuit split created by the Eighth Circuit's opinion, and to restore a reasonable jury verdict that was supported by substantial evidence.

I. The District Court and the Eighth Circuit Both Redrafted the RICO Statute's "Enterprise" Requirement; the Courts' Respective Determinations Constitute Pure Legal Errors in Conflict with this Court's Precedent

First, the district court did not dismiss the RICO counts against Viacom "on the ground that record evidence failed to establish" an association enterprise. Viacom Resp. Br. at 1 (citing Pet. App. 53a-55a). Rather, it found that the allegations in the complaint failed to allege a common *fraudulent* purpose. Pet. App. at 54a (holding that "an association-in-fact

enterprise cannot consist of innocent participants" and that such an enterprise must have a "common purpose to engage in a particular fraudulent purpose"). The district court's holding in this regard was not a factual one; it was a legal determination arising from pre-trial motion practice.[1] The district court incorrectly rejected Petitioners' argument—supported by this Court's precedent—that the RICO statute merely requires a common purpose to establish an association-in-fact enterprise. Pet. App. at 54a. Instead, the district court imposed an additional requirement—that the common purpose must be fraudulent. *Id.*

Second, the Eighth Circuit did not determine whether the district court's imposition of the "fraudulent" requirement was proper. Pet. App. 39a. Rather, the Eighth Circuit held that "divergent goals" among members of a purported association-in-fact enterprise is a "'fatal problem' to a RICO claim," and imposed its own additional requirement that the members of a RICO enterprise must have *all* purposes in common. Pet. App. 41a. The Eighth Circuit ignored the legal nature of the district court's association-in-fact determination. Instead it noted its own "disagree[ment] with [the complaint's] characterization" of the common purpose alleged by Petitioners and cherry-picked among the allegations in the complaint to support its position that the common purpose alleged by Petitioners—"leasing property

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[1] The district court made its determination in the context of a motion for summary judgment but, because it relied exclusively on the allegations in the complaint, the district court made no factual determinations based on the evidentiary record; its holding was purely legal. Pet. App. 54a.

owned by the railroad to outdoor billboard businesses"—was not a "sufficient" common purpose. Pet. App. 40a-41a.

The Eighth Circuit is not free to pick and choose amongst the allegations in the complaint to determine whether there was a common purpose of the association between Viacom and its three client railroads. The Eighth Circuit was obliged to consider *all* allegations in the complaint. But the Eighth Circuit ignored the allegation—which Petitioners established at trial—that all three of the client railroads and Viacom had a *contractual relationship*, the common purpose of which was "[to] engage[] in a course of conduct," namely to "leas[e] property owned by the railroad to outdoor billboard businesses." Pet. App. at 41a, 40a (citing *United States v. Turkette*, 452 U.S. 576, 583 (1981)); *see also* Viacom Resp. Br. at 2-3 (referring to the management contracts).

This contractual relationship, standing alone, is plainly sufficient to meet the standard set out by this Court in *United States v. Turkette* that the association have "a common purpose of engaging in a course of conduct." 452 U.S at 583. Petitioners alleged, and proved at trial, that Viacom and the railroads signed contracts that committed the parties to a common purpose, leasing railroad property to outdoor billboard businesses. Pet. App. at 6a, 7a, 25a.

Though the Eighth Circuit cited *Turkette* to support its ruling, it ignored this Court's admonition regarding statutory interpretation: "In determining the scope of a statute, we look first to its language. If the statutory language is unambiguous, in the absence

of 'a clearly expressed legislative intent to the contrary, that language must ordinarily be regarded as conclusive.'" 452 U.S. at 580.

The Eighth Circuit also ignored this Court's rejection of the First Circuit's attempted narrowing of association-in-fact enterprises to only "legitimate" associations. *Id.* at 580-81. But most importantly, it ignored this Court's simple expression of an association-in-fact enterprise as a group "associated together for a common purpose of engaging in a course of conduct" and this Court's oft repeated observation "that Congress opted for a far broader definition of the word 'enterprise,' and we are unconvinced by anything in the legislative history that this definition should be given less than its full effect." *Id.* at 583, 593.

At the heart of both the district court and the Eighth Circuit's errors is the section of the RICO statute that defines the phrases "racketeering activity," "person," and "enterprise." *See* 18 U.S.C. § 1961(4). Congress drafted the RICO statute to, among other things, prohibit persons from engaging in racketeering activity to acquire control over an otherwise legitimate enterprise or to conduct the affairs of an enterprise through a pattern of racketeering activity. 18 U.S.C. § 1962. To further these objectives, Congress defined the term "enterprise" as including two general categories: legal entities (including corporations and partnerships) and associations of groups or individuals. 18 U.S.C. § 1961(4); *see also Turkette*, 452 U.S. at 581-82. Congress sought to protect these enterprises from those persons who sought to corrupt them through a pattern of racketeering activity. 18 U.S.C. § 1962.

It is unremarkable that the party corrupting the enterprise may have some goals that are inconsistent with its contractual obligations and that conflict with the goals of other members of the association-in-fact. The statute is aimed at preventing racketeers from corrupting enterprises, both "legal entities" and associations-in-fact. Thus, the corrupting influence that RICO is designed to deter presupposes *some* conflicting purposes. Just as a corporation's legitimate purposes may be undermined by a pattern of racketeering activity, so too would an association's purposes, but that fact does not relieve the racketeer of RICO liability.

For these reasons, it makes no sense to conclude—as the district court did—that the associations-in-fact that Congress sought to protect from racketeering, must have a common fraudulent purpose to constitute an "enterprise." This holding clearly violates the lesson of *Turkette*: "[o]n its face, the definition . . . include[s] both legitimate and illegitimate enterprises within its scope; it no more excludes criminal enterprises then it does legitimate ones." 452 U.S. at 580-81. For the same reasons, it makes no sense to conclude that the only associations-in-fact that Congress sought to protect from racketeering by defining them as "enterprises," are those with *all* purposes in common.

The Eighth Circuit correctly identified the definition that this Court adopted for association enterprises. Pet. App. at 40a. An association "enterprise is . . . a group of persons associated together for a common purpose of engaging in a course of conduct." *Turkette*, 452 U.S. at 583. It even cited

comparable language from the First and Eighth Circuits. Pet. App. at 40a. While all of these authorities use the phrase "a common purpose," none support the Eighth Circuit's conclusion that the existence of "divergent goals" of some members of an association—presumably even if there is a common purpose—is "fatal" to a RICO claim. Nor is there any support for this conclusion in the statute itself.

Just as in *Turkette*, "[c]onsidering . . . the Act's broad purposes, the construction of RICO suggested by respondent and the court below is unacceptable." 452 U.S. at 589. If the decision below is allowed to stand, in the Eighth Circuit "[w]hole areas of organized criminal activity [will] be placed beyond the substantive reach of the enactment." *Id.* All a RICO defendant will be required to do—in either a criminal or civil case—is point to a goal he did not share with the association as a whole, and he will be free of criminal or civil responsibility for his crime.

II. The Eighth Circuit's Decision Creates a Clear Circuit Split

Despite Viacom's attempts to harmonize clearly incompatible cases, the Eighth Circuit's opinion is in conflict with both the Sixth Circuit case *Williams v. Mohawk Industries, Inc.*, 465 F.3d 1277 (11th Cir. 2005), and the Second Circuit case *United States v. Orena*, 32 F.3d 704 (2d Cir. 1994).

Viacom claims that in *Mohawk*, the Sixth Circuit found an association-in-fact enterprise existed because the employer and third-party recruiters were "distinct entities that, at least according to the complaint, were

engaged in a conspiracy to bring illegal workers into this country." Viacom Resp. Br. at 18 (citing *Mohawk*, 465 F.3d at 1284). Thus, Viacom argues that the common purpose in *Mohawk* was to engage in the illegal conspiracy itself. *Id.* Viacom claims that the Eighth Circuit's decision in this case is entirely consistent with *Mohawk* because "whatever divergent purposes they may also have held, both the principal and the agents" shared the common purpose of engaging in an illegal scheme. *Id.*

First, *Mohawk* addressed more than the existence of an association-in-fact enterprise; it also addressed whether the association-in-fact enterprise shared a "common purpose." *Mohawk*, 465 F.3d at 1284. Thus, *Mohawk* addresses exactly the same question as does the Eighth Circuit's opinion in this case. Contrary to Viacom's representation, however, the Court in *Mohawk* found a "common purpose" because the employer and the third-party recruiters had a common purpose of "making money." *Id.* Thus, the common purpose identified in *Mohawk* was a pecuniary one—the conspiracy to bring illegal workers into the country was simply the means the parties employed to achieve their common purpose.

Mohawk is in direct conflict with the Eighth Circuit's holding in this case because Petitioners alleged and proved at trial that Viacom and the railroads had a *contractual relationship*, the aim of which was pecuniary gain. *See supra* at 3. That Viacom chose to pursue this common purpose through nefarious means is irrelevant. The RICO statute requires "a common purpose" and nothing more.

The Sixth Circuit expressly recognized this conflict when it noted that *Mohawk* conflicts with *Baker v. IBP, Inc.*, 357 F.3d 685 (7th Cir. 2004), which the Eighth Circuit relied on in this case to impose its "no divergent goals" requirement to establish a common purpose. *Baker* held that it was a "fatal problem" that the employer in that case wanted to pay lower wages and the recruiters wanted to be paid more for their services, creating "divergent goals." *Id.* at 691.

The conflict the Sixth Circuit notes, in a sense, relates to the degree of abstraction at which courts should analyze the common purpose requirement. For example, the Sixth Circuit holds that "making money" is a common purpose sufficient for a RICO claim, even if the members of the enterprise have different financial interests. In contrast, the Seventh Circuit, and now the Eighth Circuit, hold that "making money" is not a common purpose, if members of an association-in-fact enterprise pursue the common purpose of making money in different ways. The Eleventh Circuit even noted this clear conflict in its opinion. *Mohawk*, 465 F.3d at 1285.

Similarly, the Eighth Circuit's "no divergent goals" requirement creates an unavoidable conflict with the Second Circuit's holding in *Orena*. Viacom attempts to distinguish *Orena* on the basis that the Mafiosi identified as enterprise members "indisputably shared the common purpose of advancing the enterprise's criminal activities," while the Eighth Circuit in this case found, as a purported matter of fact, that Viacom and the railroads shared no common purpose at all. Viacom Resp. Br. at 20. Like in

Mohawk, however, the common purpose in *Orena* was pecuniary—the members of the enterprise chose crime as the means of achieving this common purpose. *See Orena*, 32 F.3d at 710 (noting that, despite murderous dissention between the Mafiosi, they all sought to obtain the loansharking *proceeds*). Thus, again, the key to the common purpose in *Orena* was the desire for pecuniary gain—it did not matter that the Mafiosi pursued their common purpose of making money in different ways or, in fact, that certain members of the association sought to kill other members.

The Eighth Circuit's supposed "factual" finding that there was no common purpose between Viacom and the railroads is not factual at all. Viacom and the railroads clearly had a common purpose insofar as they had a contractual relationship, the object of which was pecuniary gain. Despite Viacom's attempts to disguise the holding as factual, the Eighth Circuit necessarily held, as a matter of law that the common purpose of leasing railroad sites for money is insufficient to constitute a RICO common purpose when the members of an enterprise attempt to further that common purpose in different ways. Thus, the Eighth Circuit's decision and the *Baker* case conflict with both *Mohawk* and *Orena*.

III. The Eighth Circuit Usurped the Jury's Fact-Finding Role and Ignored Key Evidence the Jury Relied Upon because of the Court of Appeals' Open Hostility to RICO

Viacom claims that the Eighth Circuit "correctly applied settled law in concluding that Petitioners presented insufficient evidence of a RICO pattern."

Viacom Resp. Br. at 22. In their response, Respondents Gustin and Kelly similarly argue that the Eighth Circuit correctly determined that Petitioners failed to provide sufficient evidence that the RICO scheme would continue. Kelly and Gustin Resp. Br. at 22-24. But this is clearly not the case. The Eighth Circuit held that, even if the individual defendants were engaged in a fraudulent scheme to take the best railroad sites for themselves, a Viacom form letter to *other* applicants effectively terminated the fraud by declaring that Viacom would grant licenses at its "sole discretion." Pet. App. at 45a.

The jury reviewed this same letter and concluded that it did not terminate the fraudulent scheme. The jury's conclusion is reasonable because the defendants presented no evidence that the form letter was sent to Petitioners, the letter did not elaborate on what the phrase "sole discretion" means, the letter did not identify who reviewed the applications, and—most importantly—it did not acknowledge that Viacom would take the best sites for itself. Pet. App. at 72a-73a.

While Viacom argued at trial that its form letter terminated the individual defendants' fraudulent scheme, the jury rejected that argument. Because the jury could have reasonably concluded that the form letter did not terminate the fraud, the Eighth Circuit had no basis to substitute its *post hoc* analysis for that of the jury. The Court of Appeals did not give the jury's verdict the extreme difference to which it is entitled. *See Galloway v. United States*, 319 U.S. 372, 395 (1943).

Respondents Kelly and Gustin argue that an appellate court's substitution of its own judgment for that of a jury's—regardless of how brazen—does not normally warrant this Court's attention. But the Eighth Circuit's open hostility to civil RICO suits—manifesting itself in usurping the jury's verdict—warrants review of this question contemporaneously with this Court's review of the Eighth Circuit's rewriting of the RICO enterprise requirements. As Petitioners asserted in their opening brief, "the Eighth Circuit's open defiance of controlling authority" requires this Court to reverse the Eighth Circuit's "Trojan-horse attempt[] to narrow [the scope of RICO] through appellate fact-finding." Pet. at 19.

Despite being reminded of the broad remedial scope of RICO, and this Court's recent admonition in *Bridge v. Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131, 2145 (2008), that the RICO statute is not to be narrowed, the Eighth Circuit, *en banc*, refused to reconsider its decision to override the jury's verdict in order to prevent an "ordinary civil dispute" from being resolved under the RICO statute. Pet. at 5. This Court should grant the petition not only to address the conflict the Eighth Circuit created regarding the definition of an association-in-fact, but also to ensure that Petitioners and future plaintiffs in the Eighth Circuit retain the right to pursue RICO relief for fraud perpetrated by businesses, a right this Court has repeatedly protected.

IV. Equitable Standing Is Required to Uphold the Broad Remedial Protections of RICO

Viacom again suggests that the decision on Petitioner Massood's standing to bring his claims is "fact bound." But each of the decisions in this case has been a ruling based on legal interpretations, not factual ones. Viacom Resp. Br. at 29. Mr. Massood has never been afforded the opportunity to pursue his claim in the federal or state courts. Moreover, Viacom ignores the adoption of the equitable standing rule in the Second and Third Circuits under the Securities and Exchange Act of 1934. *See* Pet. at 29-30.

Where RICO fraud leads to the purchase of a corporation victim, as Petitioner Massood alleged here, a court should grant equitable standing to permit a shareholder plaintiff the opportunity to present to a jury his claims that the sale price was driven down by the fraud. To hold otherwise will allow Viacom and similar defendants to benefit from their fraudulent conduct by driving down the value of a company's stock, buying the stock at the reduced value, and thereby stripping the former owner of standing. *See, e.g., Miller v. Steinbach*, 268 F. Supp. 255, 267 (S.D.N.Y. 1967).

CONCLUSION

The Court should grant this petition for certiorari and either schedule argument or vacate the Eighth Circuit's opinion and remand to the Eighth Circuit for reconsideration in light of *Bridge*, and grant such other relief as is just.

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